2004

Bingham Consolidation Company, Plaintiff/Appellant vs. Robert Groesbeck, and individual; Marilyn Groesbeck Glade, an individual; and Robert Groesbeck and R. Clay Groesbeck as Trustees of the Robert R. Groesbeck Living Trust, a Utah Trust; Defendants/Appellees : Brief of Appellees

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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IN THE UTAH COURT OF APPEALS

BINGHAM CONSOLIDATION COMPANY, Plaintiff/Appellant vs. ROBERT GROESBECK, an individual; MARILYN GROESBECK GLADE, an individual; and ROBERT GROESBECK and R. CLAY GROESBECK as Trustees of the ROBERT R. GROESBECK LIVING TRUST, a Utah Trust; Defendants/Appellees.	Appeal No. 20040141-CA District Court Case No. 980904874

BRIEF OF APPELLEES

Appeal from the Third Judicial District Court, Salt Lake County
Judge Stephen L. Henriod

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LIST OF ALL PARTIES

All parties to the litigation are listed in the caption.

JURISDICTION

Jurisdiction is premised upon Utah Code section 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF APPELLATE REVIEW

I. IS THERE EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FACTUAL FINDINGS REGARDING WHAT ASSETS WERE OWNED BY NEW BINGHAM MARY MINING COMPANY ("MARY") AS OF THE DATE OF THE MERGER AND THE VALUE OF MARY'S SHARES BASED ON THOSE ASSETS?

The ultimate determination of fair value of a corporation's shares is a question of fact. Hogle v. Zinetics Med., Inc., 2002 UT 121, ¶10, 63 P.3d 80. Whether a given fact is relevant to fair value is a question of law. Id. The finding of breach of fiduciary duty by self-dealing is a question of fact. Hansen v. Granite Holding Co., 117 Utah 530, 218 P.2d 274, 279-80 (1950). A trial court's findings of fact, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah Rule of Civil Procedure 52(a); Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶12, 54 P.3d 1177.

The trial court found that Mary's assets included claims for breach of fiduciary duties and also included property rights of significant value. R. 1154-55, ¶¶40-41. The court also found that Mary's value had been dramatically reduced through the self-dealing of Mary's majority shareholder and management, and that Mary's fair value was not limited to the value remaining after the majority shareholder's self-dealing. R. 1154-55, ¶¶39-41.

Determinative Law: Utah Code Ann. §§ 16-10a-1301(4), -1330(1); Hogle v. Zinetics Med., Inc., 2002 UT 121, 63 P.3d 80; Hansen v. Granite Holding Co., 117 Utah 530, 218 P.2d 274 (1950).

II. DID THE TRIAL COURT PROPERLY ADMIT EXTRINSIC EVIDENCE REGARDING THE INTENT OF A MINING LEASE, I.E., IS THERE EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING THAT THE MINING LEASE WAS AMBIGUOUS, AND TO SUPPORT THE TRIAL COURT'S INTERPRETATION OF THE LEASE?

Whether a trial court has properly admitted evidence is reviewed for abuse of discretion. Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶10. Interpretation of the intentions of the parties to a contract based on extrinsic evidence is a question of fact. Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985). A trial court's findings of fact, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a); Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶12, 54 P.3d 1177.

The trial court found extrinsic evidence concerning the intent of the parties to a lease is admissible to allow the trial court to determine whether the lease is ambiguous and to interpret the lease. R. 1160, ¶51. The trial court found the mining lease does not grant a right to remove or strip waste material from Mary's property for the purpose of mining ore on adjacent property. R. 1148, ¶24.

Determinative Law: Nielsen v. Gold's Gym, 2003 UT 37, 78 P.3d 600; Yeargin, Inc. v. Tax Comm'n, 2001 UT 11, 20 P.3d 287.

III. IS THERE EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FACTUAL FINDINGS THAT THE RIGHT TO STRIP THE SURFACE OF THE PROPERTIES AT ISSUE HAD A VALUE OF APPROXIMATELY $32 MILLION AS OF THE DATE OF THE MERGER?

The determination of fair value is a question of fact. Hogle v. Zinetics Med., Inc., 2002 UT 121, ¶10, 63 P.3d 80. A trial court's findings of fact, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a); Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶12, 54 P.3d 1177.

The trial court found the fair value of the stripping rights owned by Mary was approximately $32.6 million. R. 1158, ¶44(i).

Determinative Law: Utah Code Ann. §§ 16-10a-1301(4), -1330(1); Hogle v. Zinetics Med., Inc., 2002 UT 121, 63 P.3d 80.

IV. IS THERE EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FACTUAL FINDINGS THAT THE MAJORITY AND CONTROLLING SHAREHOLDER FAILED TO DISCLOSE AND CONCEALED ITS SELF-DEALING WITH THE COMPANY AND THAT THE MINORITY SHAREHOLDERS DID NOT HAVE NOTICE OF THEIR CLAIMS?

The factual determination of when a person reasonably should know that he or she has suffered a legal injury is a question of fact. Spears v. Warr, 2002 UT 24, ¶32, 44 P.3d 742. A trial court's findings of fact, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a); Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶12, 54 P.3d 1177.

The trial court found the minority shareholders did not have notice of facts giving rise to legal claims for, did not lack diligence and did not delay unreasonably in asserting claims for, and did not take any position inconsistent with any prior position with respect to legal claims for breaches of fiduciary duties. R.1150, ¶33; R. 1153, ¶37; 1164-65, ¶¶58-59.

Determinative Law: Utah Code Ann. § 78-12-27.

STATEMENT OF THE CASE

This is a proceeding to determine the fair value of dissenting minority shareholders' shares of a merged-out corporation, New Bingham Mary Mining Company ("Mary"), under Utah Code Ann. §§ 16-10a-1330(1). Following a three day trial to the bench, the court found that Mary had specific assets of significant value as of the date of the merger. Based on those assets, the trial court found the fair value of the merged-out corporation was approximately $36 million, and that the dissenting minority shareholders were entitled to payment in the amount of approximately $1.325 million, representing their 3.8 percent ownership of Mary's shares at the time of the merger, plus interest. Bingham Consolidation Company, the successor corporation into which Mary merged, appeals the court's valuation.

STATEMENT OF FACTS

Following a three day bench trial, the trial court entered the following findings of fact:[1]

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[1]The Brief of Appellant, Bingham Consolidation Company purports to contain a statement of facts required by the Utah Rules of Appellate Procedure. Instead of stating findings of fact entered by the trial court, however, the Appellant attempts to rehash and characterize disputed evidence in a light contrary to the court's express findings of fact. Consequently, the Appellant's Statement of Facts should be disregarded.

Mary was a Utah corporation incorporated in 1929. R. 1142, ¶¶1-2. Since Mary's inception, members of the Groesbeck family were minority shareholders, including defendants Robert Groesbeck, Marilyn Groesbeck Glade, and the Robert R. Groesbeck Living Trust (collectively, "Groesbecks"). Id. ¶2. Pursuant to a merger agreement ("Merger"), Mary's majority and controlling shareholder, Kennecott Utah Copper Corporation (together with its predecessor in interest, Kennecott Corporation, "Kennecott"), caused Mary to be merged with and into plaintiff Bingham Consolidation Company ("BCC") effective January 1, 1998. R. 1142-43, ¶3. Kennecott is the sole shareholder of BCC, the surviving corporation under to the Merger. Id. The Groesbecks dissented from the Merger, and this action was brought to determine the fair value of the Groesbecks' shares ("Shares") of Mary. R. 1143, ¶¶ 4, 7.

The area of the Oquirrh Mountains relevant to this lawsuit is referred to herein as the "Bingham District." For decades, Kennecott has controlled mining properties within the Bingham District lying east of an irregular, approximately north-south boundary line located near the western edge of Kennecott's Bingham open-pit copper mine ("Bingham Mine"). Mining properties lying west of the boundary were previously controlled by a different mining company, The Anaconda Company ("Anaconda"). R. 1144-45, ¶12. From its inception, and at the time of the Merger, Mary's assets included, among other assets, two patented mining claims, the Mary Claim and the Commonwealth Claim ("Claims" or "Mining Claims"). R. 1143, ¶8. Mary's Claims were located at the boundary of the Kennecott and Anaconda properties, adjacent to Kennecott's open-pit Bingham Mine on one side and adjacent to and part of Anaconda's underground Carr Fork Mine on the other side. R. 1144-45, ¶12.

The Claims and the surrounding area of the Bingham District contain two kinds of ore: higher-grade ore located at greater depth, so-called "skarn" ore; and lower-grade ore located at shallower depth, so-called "porphyry" ore. The deeper, skarn ore was mined formerly in the Bingham District by Anaconda using underground mining methods. The shallower porphyry ore is mined in the Bingham District by Kennecott using open-pit or strip mining methods. R. 1143-44, ¶9. Due to Kennecott's mining activities, the Claims are now located within the Bingham Mine operated by Kennecott. R. 1143, ¶8.

With respect to open-pit mining methods, the trial court entered critical findings of fact regarding the value to be ascribed to the right to strip waste material from the surface of the Claims. Removing ore safely by open-pit methods requires stripping back the sides of the open pit at a relatively shallow angle to remove waste overlying and adjacent to the ore, otherwise the walls of the pit will be too steep and collapse into the open pit. Thus, safely constructing an open-pit mine with walls constructed at a safely shallow angle requires the right to strip waste from the surface over an area larger than the area of the ore body to be mined. R. 1144, ¶10. On properties located closer to the center of an open pit mine, waste material is stripped from the surface first, then the underlying ore material is mined after the waste material is removed. On properties located toward the edge of the pit, waste material is stripped from the surface, but no ore material is mined from the properties. Although no ore material is mined from those properties, stripping the waste from those properties provides necessary access to ore contained in properties located closer to the center of the open pit mine. Id. ¶11.

Accordingly, the trial court found that "stripping rights," that is, the right to strip waste from the surface of a property, have value that is separate from the right to mine ore from a property, regardless of whether the ore from the property is mined at the surface or underground. Id. The value of the stripping rights on a particular piece of property depends upon the amount of ore that could not otherwise be mined without the stripping rights. Id. That value is independent of and in addition to the value of whatever ore material may be contained within the particular piece of property. Id.

The trial court found the value of Mary to be $37.11 per share, or approximately $36 million. R. 1158-59, ¶45. That value includes the value of stripping rights associated with the Claims, Mary's cash assets, the value of porphyry mineralization contained within the Claims, and the value of deeper skarn mineralization contained within the Claims. Id. Significant evidence in the record supports both the trial court's finding that stripping rights have value independent of the value of ore contained within a piece of property and the court's finding of the value of the stripping rights associated with the Claims.

The evidence is essentially undisputed that stripping rights have significant value. Kennecott's own employees, one of whom became the manager of Kennecott's Bingham Mine and one of whom became president of Kennecott, completed a study in 1981 that analyzed the value of stripping rights associated with the Claims and other properties owned by Anaconda at the time. R. 1192, pp.96-97; R. 1193, pp.160-61, 169. That study concluded that the stripping rights associated with those properties were worth billions of dollars in net income, would provide access to ore not otherwise available to be mined, and would extend the life of Kennecott's mine by years. R. 1192, pp.97-98; R. 1193, pp.169-72; Ex. 101, pp.5-6, 16.

The importance and value of stripping rights is likewise reflected in a 1963 draft agreement among Kennecott, Mary, and Anaconda that would have granted Kennecott the right of "conducting such operations as are deemed advisable by Kennecott in the over-all open pit operation of its [Bingham Mine], including but not limited to the right . . . to strip, excavate, mine and remove or carry away . . . the surface and subsurface and the overburden in, upon, and under" the Claims and other properties controlled by Anaconda. The draft agreement notes it would be impracticable for Kennecott to mine ore from its own lands unless it obtained the right to strip the surface of the Claims and Anaconda's properties. Ex. 127, pp.1, 4.

In 1978, Mary's management sent a letter to its minority shareholders informing them there had been recent negotiations among Mary, Kennecott, and Anaconda "to agree on a three-party cross-stripping agreement which would allow Kennecott to expand the boundaries of its Bingham open-pit mine by stripping waste material and low-grade ore material from the surface of property of Anaconda and New Bingham Mary adjacent to the present boundaries of the Bingham pit." Ex. 108, p.3. Kennecott's internal memoranda refer to the "critical location" of the Claims and note Kennecott needed to resolve the issue of stripping rights before it could strip across the Claims. Exs.104, 105.

BCC's own expert witness recognized that hard rock mining requires operational lands around the mineral deposit. He also recognized that Kennecott's operations were adversely affected by its inability to strip the surface of neighboring properties and acknowledged that Kennecott had attempted without success for years to acquire the stripping rights. R. 1192, pp.68-69. He also noted that Kennecott eventually acquired Anaconda's property for the purpose of enhancing its open-pit operations. Ex. 23, pp.9-10. BCC's other witness, a former Kennecott manager who was also an officer of Mary, testified that ore located on Kennecott's property would be unreachable without the right to strip the surface of the Claims. R. 1193, pp.164, 172. He also testified that net income may be realized by acquiring stripping rights, and a rational economic actor would pay for the right to strip the surface of the Claims if they produced net income. Id., pp.167-69.

The value of the stripping rights associated with the Claims was established by the trial testimony of the Groesbecks' expert witnesses, Bernard J. Guarnera and Donald P. Bellum. R. 1155-59, ¶¶43-45. Mr. Guarnera has more than forty years experience in the mining industry, specializing in the valuation of mineral properties and mining companies. His vast experience includes analysis and valuation of mining properties, mining property acquisitions, and negotiating and evaluating mining leases for major mining companies and other corporations. R. 1193, pp.293-300; Ex. 126 at Appendix 1. Likewise, Mr. Bellum has decades of experience in the mining industry, including performing valuations and acquisitions of mining properties, including several copper mine acquisition programs, and operating a number of mines and mining divisions for major corporations. R. 1193, pp.258-63; Ex. 126 at Appendix 1.

Based on his knowledge and experience in the mining industry, Mr. Guarnera testified hat a willing, prudent buyer would pay and a willing, prudent seller would sell the right to strip the surface of the Claims in return for a two percent net smelter returns royalty from the sale of minerals that otherwise would be inaccessible without the right to strip the surface of the Claims. R. 1194, pp.331-32, 339, 365. Based on his knowledge and experience, Mr. Bellum testified a willing buyer would pay and a willing seller would sell the right to strip the surface of the Claims in return for fifteen percent of the net cash flows that would be generated from the sale of minerals otherwise inaccessible without the right to strip the surface of the Claims. R. 1193, pp.282-83. The Groesbecks' experts testified that they applied discounted cash flow methods to calculate the net present value of the income that would be derived from a two percent net smelter returns royalty and/or fifteen percent of the net cash flows. R. 1193, p.281; R. 1194, p.333. The trial court found the expertise and qualifications of Messrs. Guarnera and Bellum unquestionable by reason of their skills, backgrounds, education, and experience, and found their expert testimony reliable, helpful, and persuasive in determining the fair value of Mary's assets. R. 1155-56, ¶¶43, 44.

The court adopted the appraisal and methodology of Messrs. Guarnera and Bellum and, on that basis, found the fair value of the stripping rights associated with the Claims was approximately \$32.6 million. R. 1158, ¶44(i). Although BCC affects disbelief at the notion Kennecott would pay \$32.6 million for such rights, the trial court entered a finding of fact that the stripping rights control access to ore reasonably projected by the income method of valuation to generate more than \$3 billion in gross revenues. R. 1157, ¶44(f). This amounts to more than \$762 million in profit with a net present value of more than \$238 million as of the date of the Merger. Id. BCC does not dispute these findings. Moreover, the \$32.6 million figure represents the net present value of royalties and payments to Mary that would accrue over the life of the mine. It need not have been paid out in a lump sum but for the squeeze out merger that occurred.

Furthermore, the Groesbecks' expert testified that, even after paying Mary the fair value of the stripping rights, Kennecott would still realize an acceptable rate of return on investment of 26 to 27 percent. R. 1193, p.283. He also testified that many mining companies make investments for lower returns. Id. In light of the enormous benefit derived from the right to strip the surface of the Claims and the favorable rate of return on investment, the court correctly recognized a prudent buyer would pay a 2 percent net smelter return royalty or 15 percent of net cash flows for the stripping rights.

At trial, BCC argued the Claims were encumbered by a lease ("Lease" or "Mining Lease") that purportedly gave Kennecott the right to strip the surface of the Claims without compensating Mary. BCC argued Mary's minority shareholders were therefore not entitled to their proportionate share of the value of the stripping rights. The trial court rejected BCC's argument and made specific findings of fact demonstrating the fair value of Mary included the value of the stripping rights.

The Lease was entered into between Anaconda and Mary as of April 30, 1979. R. 1194, ¶17. At that time, Anaconda was the majority and controlling shareholder of Mary, owning approximately 86.6 percent of the issued and outstanding stock of Mary. Id. Under the Lease, Anaconda was permitted to perform underground mining operations on the Claims through facilities at Anaconda's underground Carr Fork Mine. Id. The Lease provided that Mary would receive minimum annual royalties of $25,000 per year from Anaconda to be credited against a three percent net smelter return production royalty on ore Anaconda mined from the Claims. Id. The Lease provided that assignment of Anaconda's interest in the Lease without Mary's prior written consent was void and terminated the Lease at Mary's option. R. 1147-48, ¶23.

In 1985, Kennecott purchased Anaconda's shares of Mary and became Mary's majority and controlling shareholder. R. 1147, ¶21. From the time Kennecott purchased Anaconda's shares in 1985 until the Merger, all of Mary's officers and directors were also officers, directors, or employees of Kennecott. As such, the trial court found a conflict of interest existed between Kennecott and its designated officers, directors and employees whom it caused to be elected as Mary's officers and directors (on the one hand), and Mary and Mary's minority shareholders (on the other hand) with respect to dealings in which the interests of Kennecott were adverse to the interests of Mary and Mary's minority shareholders. R. 1147, ¶22.

Anaconda's interest under the Lease was purportedly assigned to Kennecott on November 2, 1987. R. 1148, ¶25. However, Mary's written consent to the assignment was not obtained prior to the assignment. Id. Pursuant to the terms of the Lease, the assignment was void, and Mary had the right thereafter to terminate the Lease. Although Kennecott recognized that the purported assignment was void under the terms of the Lease and that Mary had the right thereafter to terminate the Lease, Kennecott did not cause Mary to terminate the Lease. Id. Rather, Kennecott subsequently caused Mary to execute its written consent to assignment of Anaconda's interest under the Lease to Kennecott on March 17, 1988. Id.

The court found that, at the time Kennecott caused Mary to provide written consent to the assignment, Kennecott and Mary's officers and directors knew the value of the stripping rights and knew the Claims were in a critical location with respect to westward expansion of the Bingham Mine. R. 1149, ¶27. The court further found that, to ensure that Mary and its minority shareholders received fair value for the stripping rights, independent officers and directors of Mary would have terminated the Lease after Anaconda's interest under the Lease was assigned to Kennecott without Mary's written consent. R. 1148-49, ¶26. Moreover, the court found Kennecott's self-dealing with respect to the Lease constituted breaches of the fiduciary duties of Kennecott and Mary's officers and directors designated by Kennecott. R. 1151, ¶35(c); R.1153, ¶36.

The court further found Kennecott and Mary's officers and directors breached their fiduciary duties to Mary and Mary's minority shareholders because they: (1) failed to seek or obtain the judgment of independent directors, independent legal counsel, or independent, disinterested third-parties ("impartial judgment") to protect Mary's rights with respect to assignment of Anaconda's interest in the Mining Lease to Kennecott; (2) failed to inform Mary's minority shareholders that Mary's prior written consent was not obtained before the purported assignment of Anaconda's interest to Kennecott; (3) failed to inform Mary's minority shareholders that the Lease assignment was void because Mary had not given its written consent prior to the assignment, and that Mary could terminate the Lease; (4) failed to inform and concealed from Mary's minority shareholders that Kennecott had begun stripping waste from the surface of the Claims in 1989 and continued to do so, and that Kennecott had begun removing ore from the Claims during 1995 and continued to do so; (5)

failed to object to Kennecott's stripping of waste and mining of ore, even though the assignment was void and the Lease was terminable at Mary's will; (6) failed to seek or obtain an impartial judgment regarding the valuation of Mary's assets and shares for purposes of the Merger; and (7) failed to inform Mary's minority shareholders of the value of Mary's assets, including the value of the right to strip the surface of the Claims. R. 1151-53, ¶¶35-36.

The court therefore found that Mary's assets at the time of the Merger included Mary's claims against its officers, directors, and majority shareholder for self-dealing in breach of their respective fiduciary duties to Mary and its minority shareholders. In the alternative, the court found Mary's assets included the value of the Claims unencumbered by the Lease, which independent officers and directors would have terminated because the Lease did not compensate Mary for the value of the stripping rights. R. 1154-55, ¶¶40-41.

BCC does not challenge the findings that the breaches occurred. Instead, it challenges the trial court's factual findings that the legal claims against Kennecott and Mary's officers and directors were not barred by the statute of limitations, laches, and estoppel. After a full and fair hearing on the merits, however, the court made specific findings of fact that the minority shareholders, including the Groesbecks, did not have notice, nor through the exercise of reasonable care should have had notice, of facts giving rise to legal claims against Kennecott and Mary's officers and directors for breaches of fiduciary duty and self-dealing. R.1150, ¶33; 1153, ¶37; R. 1164, ¶58. The court further found that the Groesbecks did not lack diligence or delay unreasonably in asserting claims for breaches of fiduciary duties, nor was BCC prejudiced by any alleged lack of diligence or delay by the Groesbecks in asserting the claims. R. 1164, ¶59. Finally, the court found that by asserting the claims for breaches of fiduciary duties, the Groesbecks did not take any position inconsistent with any prior act, statement, or admission with respect to the legal claims. R. 1164-65, ¶59. Accordingly, BCC's affirmative defenses were denied. Id. ¶¶58-59.

In addition to rejecting BCC's affirmative defenses, the trial court also rejected the appraisal of BCC's expert regarding the value of Mary's assets at the time of the Merger. BCC's expert, Gerald P. Halmbacher, valued Mary's Shares at $1.10 per share, or approximately $1 million. R. 1143, ¶5; Ex. 23, p.i. The court found Mr. Halmbacher's appraisal did not reflect the fair value of Mary's assets or the Shares because it was not independent. R. 1155, ¶42. Instead, the appraisal was based on information provided by Kennecott that could only lead to a determination that was unfairly favorable to Kennecott and BCC and prejudicial to the minority shareholders. Id. Significant evidence in the Record supports the trail court's findings.

At trial, Mr. Halmbacher testified he was asked by Kennecott to perform the appraisal of Mary for Kennecott, he knew his appraisal would rely on information provided by Kennecott even though he knew Kennecott was Mary's majority shareholder, he also knew his appraisal would be the basis on which minority shareholders would be compensated for their Shares, and he knew minority shareholders would have interests adverse to Kennecott. R. 1192, pp. 41-44, 46. In the past, including in past work performed for Kennecott, when more than one party was interested in the results of his appraisal, Mr. Halmbacher had sought input from both parties. Id., pp.12-13, 35-36. In this case, Mr. Halmbacher sought no input from the minority shareholders, even though the appraisal process went through multiple drafts (one of which valued Mary at half again what Mr. Halmbacher's final appraisal valued it at) over a period of three years and received voluminous input from Kennecott. Id. p.36; Exs. 113-121.

In point of fact, the appraisal was effectively Kennecott's, not Mr. Halmbacher's. Mr. Halmbacher initially testified **he** used a discounted cash flow analysis to appraise Mary, and a spreadsheet contained in **his** appraisal represented **his** analysis and **his** calculations. R. 1192, pp.22-25. On cross-examination, though, he admitted that the spreadsheet was prepared by Kennecott using Kennecott's own assumptions. Id., p.52. Indeed, Mr. Halmbacher's appraisal adopted all of the data and assumptions provided by Kennecott, and Mr. Halmbacher knew of no change to his appraisal report recommended by Kennecott that he did not incorporate into his report. Id., pp.51-52; Ex. 121. Among the key information contained in the spreadsheet are projected prices at which metals will be sold in the future. Mr. Halmbacher adopted Kennecott's projected prices to the penny, but then proclaimed his independence in the body of his appraisal. R. 1192, p.50. But even his statement proclaiming his independence was not his own idea: it was inserted into the appraisal report at Kennecott's request. Id., pp.51-52, Ex. 121, ¶1.

It is telling that for purposes of projecting Mary's cash flows in a spreadsheet dated August 13, 1997, Kennecott used a gold price of $325. R. 1192, p.54; Ex. 122. For purposes of projecting its own cash flows in a spreadsheet dated five days earlier, Kennecott used a gold price of $385 per ounce. Id., p. 54; Ex. 123. Mr. Halmbacher incorporated the $325 figure into his appraisal report. Kennecott did see fit to tell Mr. Halmbacher that the gold price it was using to project its own cash flows was $65 per ounce greater than the price it wanted him to use to project Mary's cash flows. R. 1192, pp.54-55. Similarly, Kennecott provided information to Mr. Halmbacher concerning what Kennecott argued at trial was an asset sale comparable to the Merger, namely Kennecott's 1985 purchase of Anaconda's assets located in the Bingham District. Id., pp.21-22; Ex. 23, pp.9-10. But Kennecott neglected to inform Mr. Halmbacher that Kennecott purchased Anaconda's assets for "nuisance value" and Kennecott paid "a minor amount of money" for Anaconda's assets. R. 1192, p.58; R. 1193, p.148. Likewise, Kennecott failed to inform Mr. Halmbacher of its own 1981 analysis that showed the enormous value of the stripping rights, R. 1192, p.59, that the Claims were in a critical location with respect to expansion of the Bingham Mine, and that stripping rights had to be resolved with Mary before Kennecott could strip across the surface of the Claims. Id., pp.56-58.

Kennecott thus saw to it that Mr. Halmbacher's appraisal report contained the information Kennecott wanted it to contain, but did not contain information Kennecott wanted excluded. Accordingly, the court found that Mary's majority and controlling shareholder, Kennecott, along with Mary's officers and directors hand-picked by Kennecott, failed to seek or obtain an impartial and independent appraisal of Mary's assets and Shares in breach of their fiduciary duty to Mary and its minority shareholders. R. 1152-53, ¶¶ 35(k), 36.

SUMMARY OF ARGUMENTS

The trial court below found that the Merger occurred after years of self-dealing nabling Kennecott to mine billions of dollars of ore made accessible only through property wned by Mary. The statutory appraisal proceeding requires the court to identify the assets of the merged out corporation and value those assets. After a full and fair hearing, the court identified the assets of Mary as of the date of the Merger. The court found that Mary's assets included, without limitation, property rights unencumbered by the sweetheart Mining Lease that should have been terminated years before, or, in the alternative, a corporate right of action based on pervasive and continuing breaches of fiduciary duty. The court's valuation follows Utah law and ensures dissenting minority shareholders receive fair value for their shares.

BCC argues the court should ignore the breaches of fiduciary duties in valuing Mary. Similar to the way Kennecott glossed over its duties to Mary, BCC's brief barely gives lip service to the significant and weighty fiduciary duties that are intended to protect a corporation and its minority shareholders. If those breaches were not now rectified, they would strip Mary of the enormous asset value associated with its Mining Claims.

BCC's second attack on the valuation methodology involves the erroneous assertion that the value includes "unique" benefits that accrued to Kennecott through the Merger. But the court's valuation of the right to strip the surface of Mary's Mining Claims was properly based on a determination of the fair compensation rate a willing buyer and willing seller would negotiate in an arm's-length transaction for stripping rights. The court evaluated the competing testimony of the parties' experts and made the factual finding that the fair value was equal to a two percent net smelter returns royalty or fifteen percent of net cash flows derived from the benefit conferred by the stripping rights. The net present value of that compensation was then determined by applying discounted cash flow methods with reference to information on mining plans and costs provided by Kennecott—the very same information used by BCC's expert to arrive at his valuation.

Next, BCC urges that the court improperly considered extrinsic evidence to interpret the ambiguous terms of the Mining Lease. But the trial court followed binding Utah Supreme Court authority by considering extrinsic evidence to determine whether the Mining Lease was ambiguous and to interpret ambiguity it found resulted from missing terms. BCC argued at trial that the terms of the Lease impliedly allow the lessee to strip the surface of Mary's property to gain access to ore on adjacent property. But the term stripping is absent from the Lease, therefore the trial court considered extrinsic evidence to determine whether the reading BCC urged should be inferred. After considering evidence at trial, the court found it should not. The court's finding is supported by evidence and should not be set aside. Additionally, even if the Lease could be interpreted to allow the broad stripping rights read into it by BCC, the court also found the Lease itself was void and unenforceable against Mary as of the date of the Merger. The evidence fully supports the court's findings that Kennecott's violation of the assignment provision made the Lease itself voidable many years prior to the Merger.

BCC further argues that the value set by the court is speculative and indefensible. But, again, the trial court, considering conflicting testimony, found that a prudent buyer would pay and a prudent seller would accept, in an arm's length transaction, approximately $32 million for the stripping rights. The court's valuation was based on the net present value of a modest and reasonable royalty on the ore that is accessible only through the Claims. The court's finding is supported by evidence in the record. Indeed, Kennecott's own 1981 study supports the court's findings. Although BCC argued Kennecott would not have paid that amount for the stripping rights, Kennecott's subjective (and self-serving) testimony as to what it subjectively would have paid is not relevant to an appraisal of fair value.

Finally, BCC repeats its factual arguments rejected by the trial court that the legal claims that were a part of Mary's assets as of the date of the Merger are time-barred. Here again, the court fully considered the evidence and entered specific findings of fact that the minority shareholders did not have notice of the legal claims, did not delay in bringing the claims, and BCC suffered no prejudice as a result of any delay. Those findings are supported by evidence in the record. The court's factual findings the Groesbecks' claims are not barred should therefore not be overturned on appeal.

ARGUMENT

I. THE COURT CORRECTLY DETERMINED THAT MARY'S "FAIR VALUE" INCLUDES THE VALUE OF ALL OF THE RIGHTS AND ASSETS THAT WOULD HAVE BEEN OWNED BY THE COMPANY IN THE ABSENCE OF SELF-DEALING BY MARY'S MAJORITY AND CONTROLLING SHAREHOLDER.

This action was commenced to determine the "fair value" of Mary and the Groesbecks' Shares. Utah Code Ann. § 16-10a-1330(1). To determine Mary's fair value, the court correctly considered the value of Mary's rights and assets that would have been owned by the company in the absence of corporate self-dealing by Mary's majority and controlling shareholder, Kennecott.

In determining fair value under Utah Code section 16-10a-1330(1), courts consider asset value, market value, and investment value. See Hogle v. Zinetics Med., Inc., 2002 UT 121, ¶18, 63 P.3d 80. To determine Mary's fair value, the trial court correctly made findings of fact identifying Mary's assets at the time of the Merger. The court found that Mary's assets at the time of the Merger included its claims for breaches of fiduciary duties against its officers, directors, and majority and controlling shareholder, and the fair value of Mary had to include the value of those claims. R. 1154-55, ¶40. The court found in the alternative that Mary's assets included the Claims unencumbered by the Lease, which Mary's management should have terminated to protect Mary's best interests. R. 1155, ¶41.

BCC argues the court should have limited its valuation to consideration of assets left over after years of self-dealing by the majority and controlling shareholder. But BCC's approach requires that this Court on appeal set aside the trial court's factual findings identifying Mary's assets at the time of the Merger. Moreover, considerable authoritative case law holds that, where the fair value of shares is affected by claims for breach of fiduciary duty, those claims can and must be considered in an appraisal proceeding.

For example, in New York, a dissenting shareholder's claim for breach of fiduciary duty can only be adjudicated within a statutory appraisal proceeding. See Walter J. Schloss Assoc. v. Arkwin Ind., Inc., 455 N.Y.S.2d 844, 851-52 (N.Y. App. 1982) (dissenting opinion adopted on certiorari review by Court of Appeals at 460 N.E.2d 1090 (N.Y. 1984)). In Schloss, the dissenting shareholder claimed the majority shareholder engaged in extensive self-dealing with the merged company, intentionally depressed the value of the merged company's stock, and breached his fiduciary duty to treat minority shareholders fairly and equitably. 455 N.Y.S.2d at 845-46. The dissenting opinion, adopted by the Court of Appeals, noted the minority shareholder's claims could and must be adjudicated in a dissenter's statutory appraisal proceeding. Id. at 851-52.

> An action [separate from a dissenter's statutory appraisal proceeding] will not lie, since this would allow a dissenting shareholder, by merely alleging fraudulent or unlawful corporate conduct, to seek therein the identical relief available to him in appraisal proceedings. For example, where, as here, there is "a forced liquidation or sale of the minority shareholder's stock incident to a merger," **the full and proper monetary recovery of the fair value of the dissenters' shares may be obtained in appraisal proceedings in which the discharge of the majority's fiduciary duty to the minority can be weighed in determining fair value.**

Id. (citations omitted, emphasis added).

California likewise requires that claims for breach of fiduciary duty be brought in a dissenter's statutory appraisal proceeding. See Steinberg v. Amplica, Inc., 729 P.2d 683 (Cal. 1986). In Steinberg, the minority shareholders of a merged corporation brought an action claiming the merger corporation and its majority shareholders and directors breached their fiduciary duties with respect to a public offering of the corporation's stock. Id. at 686. The California Supreme Court affirmed dismissal of the lawsuit, holding such claims for damages must be brought in a statutory appraisal proceeding. The court noted:

> [T]he aim of appraisal is to allow mergers which are advantageous to the corporation to proceed, while assuring that minority shareholders receive a fair value for their shares. It seems clear that **a minority shareholder who, like plaintiff, claims that his shares were undervalued because of self-dealing and other misconduct by corporate insiders cannot obtain a fair value for his shares unless he is afforded the opportunity to demonstrate that the misconduct he alleges has in fact occurred.**

Id. at 690 (emphasis added).

The Indiana Supreme Court also has held that a minority shareholder must present claims for breach of fiduciary duty in a statutory appraisal proceeding. Fleming v. International Pizza Supply Corp., 676 N.E.2d 1051 (Ind. 1997). In Fleming, a minority shareholder dissented from an asset sale and sought recovery for breach of fiduciary duty with respect to the asset sale. He also sought recovery for breach of fiduciary duties and duties to protect reasonable expectations in the operation of the business and for fraud in the operation of the business. Id. at 1052, 1055.[2] The court held the dissenting shareholder could, and must, litigate claims for breach of fiduciary duty in a statutory appraisal proceeding. "[I]t is perfectly consistent with the shareholder's claim for payment in the appraisal process for the shareholder to allege that the value assigned to the shares in the merger or asset sale was too low because of the breach of fiduciary duty or fraud on the part of majority shareholders." Id. at 1057.

Delaware is another state that allows dissenting shareholders to litigate claims for breach of fiduciary duty in a statutory appraisal proceeding. In Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983), the Delaware Supreme Court adopted a "liberalized" appraisal proceeding in which the court takes into account "all relevant factors" including damages resulting from fraud or self-dealing in the merger transaction. Id. at 714. Although BCC argues Weinberger allows courts only to consider breaches of fiduciary duties in relation to the merger, Delaware case law is to the contrary. See Glassman v. Unocal Expl. Corp., 777 A.2d 242, 248 (Del. 2001) (scope of appraisal includes "**all** relevant factors" including damages and Weinberger "should not be read to restrict the elements of value that properly may be considered in an appraisal") (emphasis in original); Merritt v. Colonial Foods, Inc., 505 A.2d 757, 763-66 (Del. Ch. 1986) (pre-merger self dealing claims, to which minority

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[2]Contrary to BCC's contention, the fiduciary breaches claimed in Fleming were not estricted to fiduciary breaches related to the asset sale: "[H]ere the problem is whether the alue of the corporation was depleted prior to the asset sale by breach of fiduciary duty and ·aud." Fleming, 676 N.E. 2d at 1056.

shareholder had a proportionate right, may be litigated as evidence of fair value in appraisal proceeding).

The Utah Supreme Court has, by implication, approved this approach. In Hogle v. Zinetics Medical, Inc., 2002 UT 121, 63 P.3d 80, minority shareholders dissenting from an asset sale presented evidence that the value of their shares was artificially depressed by the majority shareholder's self dealing. Id.,¶15. The district court considered the minority's evidence, but denied the claims on the merits. Id. The Utah Supreme Court affirmed the trial court. Id.

The trial court cannot determine Mary's fair value without considering the breaches of fiduciary duty affecting its value. The court thus correctly considered the effect of Kennecott's self-dealing on the fair value of Mary's assets. In doing so, the trial court did not sweep away controls on corporate governance as BCC argues. On the contrary, the rule BCC proposes would sweep away protection of minority shareholders' rights by allowing a majority and controlling shareholder to depress the apparent value of the corporation's shares through self-dealing, then freeze the minority shareholders out at a bargain price through a cash-out merger. The cases discussed above do not allow such manipulation of corporate matters by the majority, nor should this Court. Consequently, the trial court's finding that Mary's assets at the time of the Merger included its claims for breaches of fiduciary duties should be upheld.

BCC also argues the Groesbecks may not base the value of the stripping rights on the value to Kennecott of mining its own ore on its own land. That argument ignores the reality that the stripping rights have actual value that is capable of determination. Had Mary and

Kennecott negotiated at arm's length, Kennecott would have had to pay that fair value to reach the minerals at issue. The basis of the valuation is not any particular value of the stripping rights to Kennecott. Instead, the basis of the valuation is the fair royalty rate or percent of net revenues a prudent operator would pay for the right to strip the surface of the Claims to obtain access to ore. The Groesbecks' expert witnesses testified ths fair royalty rate was two percent and the fair percent of net cash flows was fifteen percent. They also testified their determinations of those reasonable rates—which the court adopted—were based on their background and experience in the mining industry and the type of interest commonly purchased by investors in mining properties. R. 1194, p. 338-39. BCC offered no evidence to contravene the reasonableness of the royalty rates or the method of calculating the value of the stripping rights.

Moreover, the trial court correctly determined the net present value of the two percent royalty and fifteen percent of net cash flows with reference to Kennecott mining plans and costs, along with other factors such as metal prices and discount rates. The court's approach was appropriate because the Claims are located in the Bingham District and Kennecott turned out to be the operator that exploited the stripping rights. In this way, the valuation by the Groesbecks' experts is identical to the valuation by BCC's expert, which was also determined by reference to Kennecott's mining plans and costs. Because the Claims are located in the Bingham District near a massive ore body, exploiting the stripping rights to the Claims provides access to ore worth billions of dollars in revenues and hundreds of millions of dollars in profits. The fair value of the stripping rights is therefore about $32 million, according to the trial court. Exploiting stripping rights associated with different mining claims in a different mining district located a different distance from a different ore body would provide access to a different amount of ore worth a different amount of money. This illustrates that the fair value of such stripping rights, although based on a two percent net smelter returns royalty or fifteen percent of the net cash flows, would be different. Hence the amount of ore made accessible by exploiting the stripping rights is relevant to determining the value of the rights and was properly considered by the court in its valuation.

Had Kennecott not engaged in self-dealing that failed to compensate Mary for the value of the stripping rights, there would be no need for such an analysis. Indeed, the court found in the alternative that even if Kennecott had not stripped Mary's Claims already, the value of the Claims unencumbered by the Lease would be based on a royalty that would have been negotiated with an economically prudent purchaser of the stripping rights. BCC's own witness testified that the decision would have been made on an economically prudent basis. The court's valuation therefore is not based on a value unique to Kennecott.

The cases BCC cites are inapposite. In Hogle v. Zinetics Medical, Inc., the court held dissenting shareholders were not entitled to any unique value of their shares to the corporation surviving a merger. 2002 UT 121, ¶17, 63 P.3d 80. In the present case, the Groesbecks do not claim their shares have any unique value different from the rest of the shares of Mary. In Oakridge Energy, Inc. v. Clifton, minority shareholders dissented from a sale of a company's assets. 937 P.2d 130, 131 (Utah 1997). Because the assets had special value to the purchaser, the purchaser paid a premium for the assets. The value of the company, appraised as of immediately before the asset sale, turned out to be lower than the price at which the assets were sold. Because the minority shareholders dissented from the sale, they were not permitted to consider the price actually paid for the assets in determining the fair value of their shares. Id. at 134. Here, the Groesbecks do not seek any special value to the stock obtained by BCC or Kennecott as a result of the Merger. Instead, the Groesbecks seek to establish the fair value of the stripping rights Mary gratuitously and incestuously ceded to Kennecott before the Merger.

BCC argues for the first time on appeal Mary's directors were deprived the protection of procedural rules for derivative actions by shareholder that require a demand on the directors and a complaint pled with particularity. It is well established that issues raised for the first time on appeal should not be considered by the Court. Smith v. Four Corners Mental Health Ctr., 2003 UT 23, ¶19, 70 P.3d 904. Even assuming the Groesbecks' claims are derivative, however, the court found Mary's minority shareholders did not have notice of such claims prior to the Merger because Mary's majority and controlling shareholder and its hand-picked management failed to disclose and concealed from the minority shareholders facts that would give rise to such claims. R. 1149-54, ¶¶28, 33, 35(d), 35(f), 35(h), 37, & 38. By concealing facts giving rise to claims for self-dealing and then freezing out minority shareholders before such facts are discovered, Kennecott and the management it chose for Mary (and now BCC) denied the minority shareholders the opportunity to assert claims during Mary's existence. BCC cannot now complain those procedures were not followed when Mary no longer exists.

At various places in its brief, BCC infers it was the Groesbecks' burden to convince other minority shareholders to dissent from the majority shareholder's actions, and suggests the Groesbecks' were outvoted by the other minority shareholders. See e.g. Brief of

Appellant at 22, 31-32. But when it comes to self-dealing by the majority shareholder, the fairness of the transaction is subject to the strict judicial scrutiny, and the burden is on BCC to show fairness. Utah Code Ann. § 16-10a-851(c); Hansen v. Granite Holding Co., 117 Utah 530, 218 P.2d 274, 279-80 (1950) (where corporation's management is interested in any deal with corporation, dealings must be carried on with utmost fairness and good faith, and court will carefully scrutinize the dealings of management and set aside such transactions on slight grounds). Moreover, the Groesbecks were not outvoted in corporate governance matters by the other minority shareholders.[3]

Although BCC wishes otherwise, the Merger of Mary into BCC did not extinguish the Groesbecks' right to their proportional share of the value of all of Mary's assets. Instead, the trial court found the assets of Mary existing at the time of the Merger included Mary's claims against its management and majority shareholder for self-dealing with respect to the stripping rights in breach of their fiduciary duties. The court properly considered the value of those claims in determining the fair value of the Groesbecks' Shares. Moreover, the Groesbecks do not, as BCC argues, seek a windfall. The Groesbecks seek only their share of the fair value Mary would have received had Mary acted in its own interests instead of

[3]At the time of the 1979 shareholder meeting at which Anaconda caused Mary to enter into the Lease, Anaconda owned 841,323 shares of Mary. Ex. 123, p.4. At the meeting, 860,305 shares voted in favor of entering into the Lease, Ex. 2, p.3, thus 18,982 minority shares voted in favor of entering into the Lease. But 44,161 minority shares opposed entering into the Lease. Id. Similarly, at the time of the 1997 shareholder meeting at which Kennecott caused Mary to enter into the Merger, Kennecott owned 844,989 shared of Mary. Ex. 23, p.2. At the meeting, 861,939 shares voted in favor of the merger, Ex. 112, p.4, thus16,950 minority shares voted in favor of the Merger. But 36,801 minority shares opposed entering into the Merger. Thus the Groesbecks were not outvoted by other minority shareholders in matters relating to Mary.

Kennecott's. If fair value is paid, then no windfall is had by any party. If fair value is not paid, it is Kennecott, not the Groesbecks, that reaps the windfall.

II. THE COURT PROPERLY CONSIDERED EXTRINSIC EVIDENCE OF THE INTENT OF THE MINING LEASE TO RESOLVE AMBIGUITY RESULTING FROM MISSING TERMS.

The trial court properly considered Mary's representations made to its minority shareholders and other evidence, which prove that the parties to the Mining Lease intended to omit stripping rights from the Lease. "The underlying purpose in construing or interpreting contractual provisions is to determine the intentions of the parties. The court may consider extrinsic evidence of the parties' intentions where the contractual provision is ambiguous." Peterson v. Coca Cola USA, 2002 UT 42, ¶9, 48 P.3d 941. "A lease agreement, like any contract, is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, **missing terms**, or other facial deficiencies. When determining whether a contract term is ambiguous, the court is not limited to the contract itself." Nielsen v. Gold's Gym, 2003 UT 37, ¶10, 78 P.3d 600 (emphasis added) (citations and internal quotes omitted). "When determining whether a contract is ambiguous, any relevant evidence **must** be considered. . . . A judge should therefore consider any credible evidence offered to show the parties' intention." Yeargin, Inc. v. Tax Comm'n, 2001 UT 11, ¶39, 20 P.3d 287 (ellipses in original) (emphasis added).

The very Lease language BCC quotes in its brief shows the Lease does not grant the right to strip the Claims for the benefit of adjacent property. The Lease grants the right,

> to develop, extract, take, mine, save, and sell minerals **from the [Claims]**, and to engage in related operations with respect to all veins, loads and mineral deposits **contained in or on the [Claims]** . . . .

Ex. 3, p.2 (emphasis added). The Lease is silent as to stripping waste from the Claims to enable the lessee to extract ore not "contained in or on the [Claims]." Thus the Lease unambiguously does not grant the lessee the right to strip the surface of the Claims for the benefit of other property. Accordingly, any error by the trial court in admitting extrinsic evidence is harmless.

Alternatively, at most, the exclusion of stripping rights from the Lease creates ambiguity with respect to the parties' intent. Accordingly, the court did not err by considering extrinsic evidence to determine whether the parties to the Lease intended to grant the lessee the right to strip waste from the Claims to benefit adjacent property. BCC fails to marshal the evidence consistent with the court's finding that, in the absence of an express term contained in the Lease allowing the lessee to strip waste from the surface of the Claims for the benefit of adjacent property, no such terms should be implied. In fact, considerable evidence supported the trial court's determination.

For example, in 1978, Mary sent a letter to its minority shareholders informing them: "An agreement is now being negotiated between Anaconda and [Mary] that will permit Anaconda to conduct under-ground mining operations on the Mary and Commonwealth claims through the facilities of the Carr Fork Mine." Ex. 108, p.2. The letter explained the Carr Fork Mine was scheduled to begin production in 1979, and that Anaconda had concluded the Claims contained sufficient mineralization "to be considered a potential economic copper ore body that can be mined from the Anaconda Carr Fork Mine." Id., pp.2-3. There is no mention the proposed lease contemplates strip mining or will grant the lessee stripping rights. To the contrary, the same letter provided,

> Also, there have been negotiations between officials of Anaconda, your management and officials of Kennecott to agree on a three-party cross-stripping agreement which would allow Kennecott to expand the boundaries of its [Bingham Mine] by stripping waste material and low-grade ore material from the surface of property of Anaconda and [Mary] adjacent to the present boundaries of the [Bingham Mine].

Id., p.3. Because separate negotiations were occurring apart from negotiations for the Lease, the letter shows neither Anaconda nor Mary intended the Lease to grant the right to strip the surface of the Claims to gain access to ore on adjacent property.

Following the letter, the proxy statement distributed to Mary's minority shareholders announcing a meeting of shareholders to approve the Lease stated, "In the opinion of the Board of Directors of [Mary], the copper mineralization cannot economically be mined or exploited by the company because of its **great depth and because it is surrounded by lands owned by other parties** [i.e., Kennecott]. It is also the opinion of the Board of Directors that **the most efficient method of extracting the mineralized metal is through the Carr Fork Mine currently being developed by Anaconda**." Ex. 125, p.2 (emphasis added). Although BCC claims other portions of the proxy statement allude to deposits that could be mined by a combination of open pit and underground mining methods, the passage BCC quotes in its brief actually refers to total ore reserves contained in Anaconda's Carr Fork properties, not Mary's Claims. Compare Brief of Appellant at 29-30, with Ex. 125, p.2.

Indeed, statements by Anaconda's representatives at the meeting of shareholders during which the Lease was approved show Anaconda wished to dispel the possibility of mining on the Claims by open pit methods. The meeting minutes reflect that Anaconda's representative at the meeting informed Mary's minority shareholders, "if it were not for the

Carr Fork Mine, [Mary's] properties would lie dormant, because **ore could not be mined from the adjacent Kennecott pit, but must be mined from underground**." Ex. 2. Moreover, the minutes reflect when Robert Groesbeck asked at the meeting about expansion of Kennecott's Bingham Mine, Anaconda's representative responded Kennecott had no known plans to expand its mine in the Bingham area. Id. Plainly, if it were not anticipated Kennecott intended to expand its mine to include the Claims, it was not intended the Lease would allow Kennecott to do so. Rather, Anaconda's remarks at the meeting show it dismissed the idea that the Lease was intended as a vehicle for anyone to strip the surface of the Claims. Importantly, the trial court found Anaconda never expressed that the Lease was intended to include the right to strip waste from the Claims or to mine the surface of the Claims, and Anaconda never conducted surface mining activities on the Claims or stripped any waste from the surface of the Claims or anywhere in the Bingham District. R. 1146-47, ¶¶19-20.

Finally, the evidence is clear that these parties knew how to draft a provision that grants stripping rights when it was their intent to do so. The terms of the Lease differ significantly from the 1963 draft agreement that would have expressly granted Kennecott the right to "strip . . . overburden" from the Claims and other properties controlled by Anaconda. Ex. 127, p.4. And BCC's witness testified that, under that draft agreement, Mary would have been compensated for each ton of waste removed from its property. R. 1992, pp.88-89. No similar express grant of stripping rights and no similar compensation to Mary for the exercise of stripping rights is included in the Lease.

The court found the terms of the Lease necessarily include a right to strip the surface to reach ore contained within the Claims, but the terms do not include a right to remove or strip waste from the Claims for the purpose of mining ore on adjacent property. R. 1148, ¶24. The Utah Supreme Court precedent cited earlier commanded the trial court to consider all relevant evidence to determine whether the Lease was capable of more than one reasonable interpretation as a result of that missing term. Examination of relevant evidence led the trial court to find the Lease was not intended to convey the right to strip waste material from the surface of the Claims for the purpose of obtaining access to ore on adjacent property. R. 1146, ¶16. That finding was based on substantial, competent, admissible evidence and may not be disturbed. Kimball v. Campbell, 699 P.2d 714, 716 (Utah 1985).

BCC argues that extrinsic evidence may not be employed to determine the meaning of the Mining Lease. But the cases on which BCC relies predate Utah Supreme Court law governing interpretation of contractual terms. For example, in Yeargin, the Utah Supreme Court specifically instructed lower courts to review "**any relevant evidence**," extrinsic or otherwise, when analyzing whether contractual terms are ambiguous. See Yeargin, 2001 UT 11 at ¶39 (emphasis added); see also Ward v. Intermountain Farmers Assoc., 907 P.2d 264, 268 (Utah 1995) ("[A]ny relevant evidence must be considered. Otherwise, the determination of ambiguity is inherently one-sided[.]").

BCC makes much of preserving "the sanctity of written instruments" and the integration clause contained in the Lease. Brief of Appellant at 28. But the purpose of safeguarding the sanctity of written documents is to protect bargained-for agreements negotiated at arm's length and memorialized in writing. See Reliance Ins. Co. v. Utah Dep't of Transp., 858 P.2d 1363, 1370 (Utah 1993) (courts will not interfere with contracts that are **negotiated at arm's length**). A quite different policy applies when an agreement is not negotiated at arm's length; that policy seeks to ensure that one party has not violated its fiduciary duty to the other. Where, as here, there were no arm's length negotiations, the inquiry is whether the contract is fair to the party to whom a fiduciary duty is owed. See e.g. Utah Code Ann. § 16-10a-851. That standard applies in this case, where the Lease was entered into between Mary and its majority and controlling shareholder, Anaconda.

The Utah Supreme Court recently dealt with contracts in which one party owes a fiduciary duty to the other:

> Parties to premarital agreements do not deal with one another at arm's length. . . The mutual trust between the parties raises an expectation that each party will act in the other's best interest. The closeness of this relationship, however, also renders it particularly susceptible to abuse. Parties to premarital agreements therefore are held to the highest degree of good faith, honesty, and candor in connection with the negotiation and execution of such agreements.

Peirce v. Peirce, 2000 UT 7, ¶20, 994 P.2d 193, 198. The court stated that in examining such agreements, "we are careful to ensure than **neither [party] has abused his or her mutual trust and fiduciary duty**." Id. (emphasis added); see also Woodhaven Apartments v. Washington, 942 P.2d 918, 924 (Utah 1997) ("parties may contract **at arm's length** without the intervention of the courts to rescue one side of the other from the result of that bargain") (emphasis added); Shell Oil Co. v. Brinkerhoff-Signal Drilling Co., 658 P.2d 1187, 1189 (Utah 1983) ("An indemnity agreement may be invalidated . . . where shown to have resulted from duress, disparity of bargaining power, or **negotiations conducted at less that arm's length.**") (emphasis added).

The same considerations apply here. Neither Anaconda nor Kennecott dealt with Mary at arm's length, and there was an expectation and duty they would act in Mary's best interest. Moreover, the situation of a company dealing with its majority and controlling shareholder is particularly susceptible to abuse. Accordingly, it was more than ordinarily appropriate for the court to consider extrinsic evidence of the parties' intent when they entered into the Lease.

Even if BCC were to overcome the high burden of showing the trial court abused its discretion in admitting extrinsic evidence, and the high burden of setting aside the trial court's factual finding concerning the intention of the parties to the Mining Lease, the error in admitting the extrinsic evidence was harmless. The trial court found Kennecott and Mary's management breached their respective fiduciary duties to Mary and its minority shareholders by failing to seek or obtain the impartial judgment of an independent and disinterested third party with respect to Kennecott's continuing and ongoing activities on the Claims and by allowing Kennecott to strip the surface of the Claims because the Lease should have been terminated. R. 1151-53, ¶¶35(e), (g), (i), & 36. The Lease should have been terminated because it fails to compensate Mary for the value of the stripping rights. That fact is not changed even by the untenable interpretation of the Lease BCC urges.

III. THE TRIAL COURT'S VALUATION MUST BE SUSTAINED BECAUSE EVIDENCE IN THE RECORD SUPPORTS THE COURT'S DETERMINATION OF THE FAIR VALUE OF MARY'S ASSETS AND THE GROESBECKS' SHARES.

Although BCC valued Mary at only $1.10 per share, the court valued Mary at $37.11 per share. R. 1159, ¶46. The court's findings are based upon its consideration of the live testimony of the parties' respective witnesses. The trial court's findings must be sustained because they find substantial support in the evidentiary record, including the testimony of BCC's witnesses.

"Evaluating conflicting testimony is the proper role of the finder of fact. When an appellant asserts that the evidence is insufficient to support the lower court's findings of fact, 'we do not weigh the evidence de novo.' Rather, we accord great deference to the lower court's findings, 'especially when they are based on an evaluation of conflicting live testimony.'" Hogle v. Zinetics Med., Inc., 2002 UT 121, ¶16, 63 P.3d 80 (citations omitted). To prevail on appeal, BCC bears a heavy burden. It must marshal "all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even viewing it in the light most favorable to the court below." Id.

The Groesbecks' expert witnesses testified authoritatively that the fair value of the stripping rights was approximately $32 million. R. 1193, p.283; R. 1194, p.334. Contrary to BCC's argument, the Groesbecks' witnesses arrived at the value of the stripping rights by applying discounted cash flow methods. R. 1193, pp. 237, 263, 281. In reality, BCC now argues stripping rights have no value, but the court found to the contrary. R. 1144, ¶11. BCC does not and cannot challenge that finding because both of BCC's witnesses at trial acknowledged the value of stripping rights.

The study completed by Kennecott employees in 1981 reached conclusions strikingly similar to the conclusions of the Groesbecks' expert witnesses: Stripping rights are worth billions in net income, tens to hundreds of millions in net present value, provide access to ore not otherwise available, and extend the life of a mine by years. R. 1192, pp. 96-97; R.

1193, pp.160-61, 169-72; Ex. 101, pp. 5-6, 16. BCC's witness, a former Kennecott manager, admitted a prudent economic decision maker would have acted on the recommendation contained in the 1981 study and acquired the stripping rights if the economic analysis were sound. R. 1193, pp.167-69. The court unequivocally found the economic analysis of the Groesbecks' expert witnesses to be sound. R. 1155, ¶43. In light of the value of the stripping rights, it is no surprise that BCC's witnesses testified Kennecott had tried to acquire stripping rights to the Claims and Anaconda's property for decades, but Anaconda had rejected Kennecott's proposals. R. 1192, pp. 68-69, 86-89; Ex. 23, p.10.

The former Kennecott manager who testified on behalf of BCC spoke in some detail at trial concerning a 1963 draft agreement among Kennecott, Anaconda, and Mary. R. 1192, pp. 87-89. The difference between that draft agreement, negotiated at arm's-length between Kennecott and Anaconda, and the Mining Lease that form's the basis of BCC's appraisal, which was not negotiated at arm's length, is striking. Under the draft agreement, Anaconda would receive the gross value of minerals recovered and sold from its property (minus costs other than mining), and also receive compensation for each ton of waste removed from its property. Id. pp.88-89. Under the 1979 Mining Lease between Anaconda and Mary, Mary would receive only three percent of the gross value of minerals recovered and sold from the Claims (minus costs other than mining and concentrating), and would receive nothing for waste removed from the Claims. Ex. 3, pp. 3-4. The Groesbecks' expert witness testified that, under the terms of the 1963 draft agreement, the appraised value of Mary would be about twenty times greater than the $1 million value of Mary found by BCC's expert under the terms of the Lease. R. 1193, p. 287. Although that testimony did not form a basis for the court's valuation, the difference in value created by the 1963 draft agreement compared to the value created by the Lease highlights the very different expectations encountered when parties negotiate at arm's length, as opposed to when parties engage in self-dealing with an inherent conflict of interest.

Abundant evidence in the record shows Kennecott recognized stripping rights were a critical issue that had to be resolved before it could expand its mine. R. 1193, pp. 207, 217. The rights were critical indeed: Acquiring the stripping rights to property owned by Anaconda and Mary would extend the life of the Bingham Mine by years. R. 1192, pp. 97-98; Ex. 101, p.16. And undisputed evidence showed recovery of ore would be foregone without the right to strip the surface of the Claims. R. 1193, pp.172, 267-68.

There is no doubt stripping rights have value. Accordingly, the issue before the court was to determine the fair value of the stripping rights. Utah Code Ann. § 16-10a-1330(1). The Groesbecks' experts framed the issue as, "what would a prudent buyer pay and a prudent seller accept for the right to mine the reserves that can be made available by acquiring stripping rights to the [Claims]." R. 1194, p.365. BCC's expert witness agreed fair value means the price a property would bring in an open market with a willing buyer and willing seller under no constraint. R. 1192, p. 65. Based upon their extensive experience in the mining industry, appraising mining properties, managing and operating mining companies and mining operations, and negotiating acquisitions and sales of mining properties, the Groesbecks' experts concluded a prudent buyer would pay and a prudent seller would accept either: 1) fifteen percent of the net cash flows derived from the sale of minerals made available by acquisition of the stripping rights; or 2) a two percent net smelter return royalty from the sale of minerals made available by acquisition of the stripping rights. R. 1193, pp. 282-83; R. 1194, pp.330-32. The court adopted the Groesbecks' witnesses methodology and appraisals. R. 1155-56, ¶¶43-44.

After considering the testimonial evidence before it, the trial court valued the Groesbecks' shares at $37.11 per share. BCC asks this Court on appeal to weigh conflicting witness testimony and evidence anew. But that is the role of the trial court, not the court on appeal. Because the trial court's valuation is based on sufficient evidence, it must be affirmed.

BCC's argument on this point is a clever sleight of hand. BCC frames the issue as a question of fair value. But what BCC actually argues is that the Groesbecks failed to show Kennecott would have paid the fair value found by the court. The probability that a particular party (Kennecott) would have entered into a transaction is not an element of fair value. If BCC were allowed to make that argument, litigants in every appraisal proceeding would argue their **subjective** determination of what they would or would not have paid in a transaction, which is irrelevant to the determination of an **objective** fair value. The argument is a red herring: Kennecott **did** enter onto the property to strip waste and expand its pit. Kennecott **did** exercise the stripping rights. Kennecott **did** reap enormous profits, and Mary did silently submit without any independent review. The factual issue before the court was to determine the fair compensation due to Mary, not the value Kennecott would have agreed to pay.

BCC further argues Mary would not have ignored its own vulnerability in being economically unable to mine its own minerals in negotiating with Kennecott. By the same token, Kennecott would not have ignored the substantial mineral wealth it would have foregone (billions in revenues, hundreds of millions in profits, years of extended mine life) had it not exploited the stripping rights. The court's valuation, based on the Groesbecks' expert witness testimony, resolved those questions and must be affirmed.

BCC attempts to re-argue the evidence pertinent to the factual findings it disagrees with, and faults the court for not considering the sale of Anaconda's assets to Kennecott in valuing the stripping rights (ironic, since BCC simultaneously argues stripping rights have no value). The court correctly dismissed the relevance of the Anaconda sale inasmuch as BCC's own witness testified Kennecott picked up Anaconda's assets for "nuisance value" and paid "a minor amount of money" for them. R. 1193, p.148. In the words of BCC's witness, Anaconda's parent company, ARCO, sold its Bingham Canyon assets to Kennecott at "just a nuisance value. They wanted to show they got something. They wanted to get out." Id., p.149. ARCO also dumped other mining properties at bargain prices, including the Berkeley Mine in Butte, Montana, which ARCO sold for about $5 to $7 million and which made the new owner $200 million in the following two years. Id., pp.149-50. The fire sale prices at which ARCO unloaded its mining properties in the mid-1980's "to show they got something" are irrelevant to determining the fair value of the stripping rights. The court correctly considered all of the evidence and entered findings that agree with the experts it found credible.

IV. LEGAL CLAIMS THAT WERE PART OF MARY'S ASSETS AT THE TIME OF THE MERGER WERE NOT TIME-BARRED.

A cause of action does not accrue, and the statute of limitations does not begin to run, until the last event that will complete the cause of action occurs. When applicable, the discovery rule prevents the running of the statute of limitations until after the claimant knows a cause of action has arisen or knows facts suggesting the probability a cause of action has arisen. Anderson v. Dean Witter Reynolds, Inc., 920 P.2d 575, 578-79 (Utah App. 1996). The applicability of the statute of limitations and the discovery rule require the factual determination of when the claimant knew or should have known a legal injury has occurred. Spears v. Warr, 2002 UT 24, ¶32, 44 P.3d 742. That factual determination, "whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Utah R. Civ. P. 52(a); Wilson Supply, Inc. v. Fradan Mfg. Corp., 2002 UT 94, ¶12, 54 P.3d 1177.

BCC argues the fiduciary duty claims are barred by the three-year limitation contained in Utah Code section 78-12-27. But section 78-12-27 incorporates the discovery rule; thus, the limitations period did not begin to run until the minority shareholders discovered the facts upon which the cause of action accrued.[4] The court below found the Groesbecks did not have notice prior to the Merger that Kennecott had been stripping the surface of the Claims

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[4]"Actions against directors or stockholders of a corporation to . . . enforce a liability reated, by law must be brought within three years **after the discovery**, by the aggrieved arty, of the facts upon which the . . . liability accrued . . . ." Utah Code Ann. § 78-12-27 :mphasis added).

and did not have notice until this litigation that the assignment of the Lease was defective and the Lease was therefore voidable. R. 1149, ¶28; R. 1149-50, ¶31; R. 1150, ¶33; R. 1153, ¶37. Neither Kennecott nor Mary's management disclosed to Mary's minority shareholders that Kennecott had begun stripping the Claims or that the assignment of the Lease was defective. Id. Indeed, the court found Mary's management concealed from Mary's minority shareholders the fact Kennecott had begun stripping the Claims. Specifically, in 1992, Mary's management misinformed the minority shareholders that the Claims were located "above and around" the Bingham Mine despite its knowledge to the contrary. R.1149-50, ¶31. In truth, Kennecott had begun stripping the Claims three years earlier, thus the Claims were located within the Bingham Mine by the time of the 1992 meeting. Id.

The court's findings that the Groesbecks lacked notice of any claims against Mary's majority shareholder or management had accrued was supported by the evidence at trial. Undisputed testimony at trial showed the minority shareholders, including the Groesbecks, were never informed until the Merger that Kennecott had begun stripping the surface of the Claims. R. 1193, 237-38. Undisputed testimony at trial also showed the minority shareholders, including the Groesbecks, never were informed of the defective Lease assignment and never received a copy of the assignment or consent until this litigation. R. 1193, pp.212-216, 237-38. And undisputed testimony showed Kennecott's representative prepared for the 1992 meeting of Mary's shareholders by consulting with Kennecott's mine manager, Greg Fauquier, and Mr. Fauquier forwarded to him a memorandum stating "Kennecott has mined and has plans to mine on the [Mary] Claims at the Bingham Canyon Mine" R. 1193, p.139; Ex.110, pp.1-2. Yet, at the shareholders' meeting, Kennecott's representative misinformed the minority shareholders the Claims were located "above and around" the open pit, not within the pit. R. 1193, pp.220-21; Ex. 22, p.4. Accordingly, no shareholder present at the 1992 meeting had reason to suspect stripping had occurred on the Claims. The evidence thus plainly supports the trial court's findings of fact that the Groesbecks' claims are not time barred.

BCC argues the Groesbecks should have visited the Claims in 1986 or 1987 to determine for themselves stripping had not occurred on the Claims. But stripping did not begin on the Claims until 1989; hence no stripping would have been observed even if the Groesbecks had visited the Claims. Moreover, the Groesbecks had no duty to visit the Claims. It is the duty of management to police the rights of the company, not the shareholders. At the 1992 shareholders' meeting, the Groesbecks were informed the Claims were above and around the Bingham Mine. There was therefore no reason to visit the Claims to confirm they had not been stripped.

Even had the Groesbecks learned stripping was occurring on the Claims, they would not have had notice of their claims. The court found Mary's majority shareholder, officers, and directors breached their fiduciary duties to the minority shareholders when they "[f]ailed to object to Kennecott stripping waste from the surface of the Claims beginning in 1989 and continuing thereafter because the assignment was void and the Lease should have been terminated." R. 1151-52, ¶35(e). No evidence was presented at trial that the Groesbecks had ıny knowledge of the defective assignment of the Lease, and no such inference may be rawn. Accordingly, the trial court's finding that the Groesbecks' claims are not time barred ıust be affirmed.

Nor are the Groesbecks' claims barred by the doctrine of laches. To establish laches, BCC was required to show lack of diligence by the Groesbecks and that BCC suffered injury due to the Groesbecks' lack of diligence. Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs., 535 P.2d 1256, 1260 (Utah 1975). BCC did not show a lack of diligence by the Groesbecks. The court found the Groesbecks were not apprised of facts giving rise to a cause of action until they learned through announcement of the Merger that Kennecott had begun stripping the surface of the Claims, and they did not learn until this litigation the Lease assignment was defective. Nor did BCC show it was prejudiced by the Groesbecks' purported lack of diligence. On the contrary, it is apparent BCC complained not about prejudice to itself, but prejudice to Kennecott. BCC claims the Groesbecks' delayed asserting their rights until there was no risk of chasing Kennecott off of the Claims with litigation. This is hardly prejudice to BCC, the purported lessor under the Lease. BCC should be delighted Kennecott proceeded to mine the Claims. Moreover, it is quite hollow to argue prejudice when Kennecott itself forced the Groesbecks into an involuntary, squeeze-out merger, especially considering the self-dealing found by the trial court added hundreds of millions to Kennecott's bottom line. In any event, any perceived prejudice BCC suffered was a result of its own failure to enforce its interests with respect to the stripping rights.

Even assuming BCC could assert the defense of laches on the basis of injury to Kennecott, any supposed injury to Kennecott is illusory as well. The Groesbecks' expert witnesses showed that, by stripping back its open pit mine across the Claims, Kennecott gained access to more than 184 million tons of ore, worth billions in revenues, and with an after-tax net present value of hundreds of millions of dollars. This is not prejudice by any measure.

BCC further argues the Groesbecks sat on their claims hoping Mary's Claims might someday have value. But the value of ore controlled by the right to strip the surface of the Claims was known for decades by Kennecott, Anaconda, and Mary's management, but was never disclosed to the minority shareholders. That value was significant, and was never received by Mary or its minority shareholders.

For the same reasons, the Groesbecks' claims are not barred by the doctrine of equitable estoppel. The defense of estoppel required BCC to show it was injured by action it took in reliance upon an admission, statement, or act by the Groesbecks that was inconsistent with the Groesbecks' claims. Nunley v. Westates Casing Servs., Inc., 1999 UT 100, ¶34, 989 P.2d 1077. BCC again attempted to rely on purported injury to Kennecott to invoke the doctrine of estoppel. And BCC pointed to no act, admission, or statement by the Groesbecks giving rise to estoppel. Instead, BCC claims the Groesbecks failed to object when Kennecott stripped the surface of the Claims. As noted above, however, the Groesbecks were not informed Kennecott was stripping the surface of the Claims and therefore had no grounds for objection. The ultimate irony, of course, is that the failure of Mary's management to object is the true cause of harm, because it had the duty, knew the facts, and had full opportunity to obtain independent counsel that would have objected to the conflict of interest.

In short, BCC failed to convince the trial court the Groesbecks knew or should have known a cause of action had arisen. Because the evidence supports the court's findings, it must be affirmed.

CONCLUSION

The trial court's valuation reflects the fair value of all of Mary's assets, not merely those remaining after years of self-dealing concealed by Mary's majority and controlling shareholder. Accordingly, the judgment of the trial court should be affirmed in its entirety.

DATED this 30th day of June, 2004

PARR WADDOUPS BROWN GEE & LOVELESS

Robert S. Clark

Daniel E. Barnett

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2004, I caused two copies of the foregoing Brief of Appellees to be served via hand delivery on the following:

John B. Wilson
PARSONS BEHLE & LATIMER
201 South Main, Suite 1800
Salt Lake City, UT 84145-0898

ADDENDUM

1. Utah Code Ann. §§ 16-10a-1301(4), 16-10a-1330(1), 78-12-27.

2. Judgment. R. 1168–1171.

3. Findings of Fact and Conclusions of Law. R. 1141–1167.

Tab 1

16-10a-1301. Definitions

For purposes of Part 13:

(4) "Fair value" with respect to a dissenter's shares, means the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action.

16-10a-1330. Judicial appraisal of shares - Court action.

(1) If a demand for payment under Section 16-10a-1328 remains unresolved, the corporation shall commence a proceeding within 60 days after receiving the payment demand contemplated by Section 16-10a-1328, and petition the court to determine the fair value of the shares and the amount of interest. If the corporation does not commence the proceeding within the 60-day period, it shall pay each dissenter whose demand remains unresolved the amount demanded.

78-12-27. Action against corporate stockholders or directors.

Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created, by law must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability accrued, and in case of actions against stockholders of a bank pursuant to levy of assessment to collect their statutory liability, such actions must be brought within three years after the levy of the assessment.

Tab 2

IMAGED

FILED DISTRICT COURT
Third Judicial District

JAN 15 2004

SALT LAKE COUNTY

By ______ Deputy Clerk

Robert S. Clark (4015)
Daniel E. Barnett (8579)
PARR WADDOUPS BROWN GEE & LOVELESS
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Telephone: (801) 532-7840
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Attorneys for Defendants

Judgment @J

JD13562582
980904874 BINGHAM CONSOLIDATION COMPANY

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

BINGHAM CONSOLIDATION COMPANY, Plaintiff, v. ROBERT GROESBECK, an individual; MARILYN GROESBECK GLADE, an individual; and ROBERT GROESBECK and R. CLAY GROESBECK as Trustees of the ROBERT R. GROESBECK LIVING TRUST, a Utah Trust; Defendants.	~~[PROPOSED]~~ **JUDGMENT** ENTERED IN REGISTRY OF JUDGMENTS DATE 01/20/04 Civil No. 980904874 Judge Stephen L. Henriod

This matter was tried to the bench on August 4, 5, and 6, 2003, Honorable Stephen L. enriod, District Court Judge, presiding. The issues having been duly tried and the Court having duly tered its Findings of Fact and Conclusions of Law, it is hereby:

ORDERED AND ADJUDGED that Defendants recover from Plaintiff the amount of 325,204.00, plus prejudgment interest at the legal rate of ten percent per year from February 18, 1998 to January 13, 2004, of $781,870.36. Defendants therefore recover from Plaintiff the amount of $2,107,074.36 as follows:

	Judgment	Prejudgment Interest	Total
Marilyn Groesbeck Glade	$530,067.20	$312,739.64	$842,806.84
Robert Groesbeck	$530,103.21	$312,760.89	$842,864.10
Robert R. Groesbeck Living Trust	$265,033.60	$156,369.82	$421,403.42;

It is hereby further

ORDERED AND ADJUDGED that Defendants recover from Plaintiff interest at the rate of $3,630.70 per day from January 14, 2004, until the date this Judgment is signed as follows: Marilyn Groesbeck Glade, $1,452.24 per day; Robert Groesbeck, $1,452.34 per day; and Robert R. Groesbeck Living Trust, $726.12 per day; It is hereby further

ORDERED AND ADJUDGED that each Defendant recover from Plaintiff interest at the judgment rate of 3.41 percent per year or as that rate may change from time to time from the date this Judgment is signed until this Judgment is satisfied; and It is hereby further

ORDERED AND ADJUDGED that Defendants recover from Plaintiff their costs incurred in this lawsuit.

DATED this 15 day of January, 2004.

BY THE COURT

Stephen L. Henriod
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January 2004, I caused a true and correct copy of the foregoing *[Proposed] Judgment* to be served via hand delivery, on the following:

John B. Wilson
Margaret Niver McGann
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Windy Manning

69638

Tab 3

FILED DISTRICT COURT
Third Judicial District

JAN 15 2004

SALT LAKE COUNTY

By ______________ Deputy Clerk

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Attorneys for Defendants

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

BINGHAM CONSOLIDATION COMPANY, Plaintiff, v. ROBERT GROESBECK, an individual; MARILYN GROESBECK GLADE, an individual; and ROBERT GROESBECK and R. CLAY GROESBECK as Trustees of the ROBERT R. GROESBECK LIVING TRUST, a Utah Trust; Defendants.	**[~~PROPOSED~~]** **FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 980904874 Judge Stephen L. Henriod

This matter was tried to the bench on August 4, 5, and 6, 2003. The Court accepted the ipulation of Facts presented by the parties. Plaintiff's Trial Exhibits 1 through 26 were offered and cepted into evidence. Defendants' Trial Exhibits 100 through 131 were offered into evidence. intiff objected to admission of Defendants' Trial Exhibits 108, 125, and 128. The Court took intiff's objections under advisement. Testimony was taken from Gerald P. Halmbacher and

William K. Orchow on behalf of Plaintiffs, and from Robert Clay Groesbeck, Barney J. Guarnera, and Donald P. Bellum on behalf of Defendants. The matter was taken under advisement at the conclusion of trial. The Court's Memorandum Decision was entered on November 7, 2003. The Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. New Bingham Mary Mining Company ("New Bingham Mary") was a Utah corporation. As of December 31, 1997, Defendants Robert Groesbeck, Marilyn Groesbeck Glade, and Robert Groesbeck and R. Clay Groesbeck as Trustees of the Robert R. Groesbeck Living Trust (collectively, "Defendants") collectively owned 36,801 of 971,200 issued and outstanding shares of stock in New Bingham Mary ("Shares") as follows: Robert Groesbeck, 14,721 Shares; Marilyn Groesbeck Glade, 14,720 Shares; and Robert R. Groesbeck Living Trust, 7,360 Shares.

2. New Bingham Mary was incorporated on April 8, 1929. Roy Groesbeck, the father of Defendants Robert Groesbeck and Marilyn Groesbeck Glade was one of the incorporators of New Bingham Mary in 1929, served as an original director of New Bingham Mary, and served as New Bingham Mary's first President. Members of the Groesbeck family have been minority shareholders of New Bingham Mary during the entire nearly 70-year existence of New Bingham Mary, from the date of its incorporation until its merger with and into the plaintiff in this lawsuit, Bingham Consolidation Company ("Bingham Consolidation").

3. Pursuant to a merger agreement ("Merger") among New Bingham Mary, Bingham Development Company, and plaintiff Bingham Consolidation, New Bingham Mary and Bingham Development Company were merged with and into Bingham Consolidation effective January 1, 1998.

Kennecott Utah Copper Corporation (together with its predecessor in interest, Kennecott Corporation, "Kennecott") is the sole shareholder of Plaintiff, the surviving corporation pursuant to the Merger.

4. Defendants dissented from the Merger and Defendants properly perfected their dissenter's rights. Defendants complied with the requirements of Utah Code Ann. § 16-10a-1330 et seq. and are entitled to an award equal to the fair value of their Shares.

5. Defendants were paid by Bingham Consolidation on the basis of $1.10 per Share for their Shares.

6. Except for the dispute regarding the obligation to pay fair value for Defendants' Shares, the Merger was otherwise conducted in accordance with Utah Law.

7. This lawsuit was filed May 14, 1998. The issue for determination by the Court in this lawsuit is the fair value of Defendants' Shares of New Bingham Mary pursuant to Utah Code Annotated § 16-10a-1330.

8. New Bingham Mary's principal assets consisted of two patented mining claims, the Mary and Commonwealth lode claims ("Claims"). The Claims are now located within the Bingham open-pit copper mine ("Bingham Mine") operated by Kennecott. The area of the Oquirrh Mountains the vicinity of the Claims and the Bingham Mine where mining has taken place over the past several cades is referred to herein as the "Bingham District."

9. The Claims and the surrounding area of the Oquirrh Mountains within the Bingham trict contain two kinds of ore: higher-grade ore located at greater depth, so-called "skarn" ore; lower-grade ore located at shallower depth, so-called "porphyry" ore. The deeper, skarn ore was

formerly mined in the Bingham District by The Anaconda Company ("Anaconda") using underground mining methods. The shallower porphyry ore is mined in the Bingham District by Kennecott using open-pit or strip mining methods.

10. Removing ore by open-pit methods requires stripping back the sides of the open pit at a relatively shallow angle to remove waste overlying and adjacent to the ore. It is dangerous to construct an open pit mine with steep walls because of the likelihood the walls of the pit will collapse into the open pit. Safely constructing an open pit mine requires the right to strip the surface over an area larger than the area of the ore body to be mined so the wall of the pit can be constructed at a safely shallow angle.

11. On properties located closer to the center of an open pit mine, overburden and waste material are stripped from the surface first, then the underlying ore material is mined after the overburden and waste are removed. On properties located toward the periphery of the mine, waste material is stripped from the surface, but no ore material is mined from the properties. Although no ore material is mined from those properties, stripping the waste from those properties provides access to ore contained in properties located closer to the center of the open pit mine. The right to strip waste from the surface of properties, or "stripping rights," thus has value that is separate from the ight to mine ore from a property whether the mining is done at the surface or underground. The alue of the stripping rights on a particular piece of property depends upon the amount of ore that ould not otherwise be mined without the stripping rights, and is independent of the value of hatever ore material may be contained within the particular piece of property.

12. Before 1985, Kennecott controlled mining properties within the Bingham District lying

east of an irregular, approximately north-south boundary line located near the western edge of Kennecott's open-pit Bingham Mine. Anaconda controlled mining properties lying west of the boundary. The ore on Anaconda's properties consisted primarily of skarn ore. Anaconda's properties also contained porphyry ore, but not enough for Anaconda to profitably operate its own open-pit mine in the Bingham District. New Bingham Mary's Claims were located at the boundary of the Kennecott and Anaconda properties, adjacent to Kennecott's Bingham Mine on one side and adjacent to and part of Anaconda's underground mine on the other side.

13. The location of the Claims adversely affected and complicated Kennecott's operation of its Bingham Mine because it prevented Kennecott from expanding its Bingham Mine to the west. Anaconda and Kennecott had discussions over many years during which the parties attempted to negotiate an agreement by which Kennecott would be able to expand its open pit by stripping across the Claims and other property controlled by Anaconda. One draft agreement was prepared but not signed in 1963. From at least as early as 1963, Kennecott and Anaconda recognized that the stripping rights to the Claims had significant economic value.

14. As of August 18, 1978, Anaconda was the majority and controlling shareholder of New Bingham Mary. At that time, Anaconda owned approximately 86.63% of the issued and outstanding stock of New Bingham Mary.

15. On August 18, 1978, New Bingham Mary sent a letter to its shareholders informing them: "An agreement is now being negotiated between Anaconda and [New Bingham] Mary that will permit Anaconda to conduct under-ground mining operations on the Mary and Commonwealth claims through the facilities of [Anaconda's] Carr Fork mine." The letter also stated: "Also there have been

negotiations between officials of Anaconda, your management and officials of Kennecott to agree on a three-party cross-stripping agreement which would allow Kennecott to expand the boundaries of its Bingham open-pit mine by stripping waste material and low-grade ore material from the surface of property of Anaconda and New Bingham Mary adjacent to the present boundaries of the Bingham pit."

16. Based on the statements of Anaconda, the intent of the proposed lease was to allow Anaconda to mine ore from the Claims by underground mining methods, but was not intended to convey the right to strip waste material from the surface of the Claims for the purpose of obtaining access to ore on adjacent property.

17. As of April 30, 1979, Anaconda caused New Bingham Mary to enter into a mining lease ("Lease") with Anaconda under which Anaconda was permitted to perform underground mining operations on the Claims through facilities at Anaconda's underground Carr Fork Mine. At the time the Lease was entered into, Anaconda was the majority and controlling shareholder of New Bingham Mary and owned approximately 86.6% of the issued and outstanding stock of New Bingham Mary. The Lease provided the New Bingham Mary would receive from Anaconda minimum annual royalties ɔf $25,000 per year to be credited against a three percent net smelter return production royalty.

18. The royalties payable to New Bingham Mary under the Lease were reasonable for the ʼpe of mining Anaconda intended to perform on the Claims, i.e., underground mining. There is no ʼidence that New Bingham Mary ever received payment for or consideration for the stripping rights the Claims, which had separate value.

19. At no time did Anaconda ever express the intent that the Lease was intended to

include the right to strip overburden or waste from the Claims or to mine the surface of the Claims.

20. Pursuant to the Lease, Anaconda mined ore from the Claims through facilities at Anaconda's underground Carr Fork Mine from August 1979 to November 1981. The Board of Directors of New Bingham Mary declared dividends on two occasions, once in 1982 and once in 1985. Defendants received and accepted their share of the dividends knowing they represented royalties paid by Anaconda to New Bingham Mary in connection with Anaconda's activities under the 1979 Lease. At no time did Anaconda conduct any surface mining activities on the Claims or strip any waste or overburden from the surface of the Claims. Anaconda never performed any open-pit or surface mining in the Bingham District.

21. Effective September 12, 1985, Kennecott purchased Anaconda's assets located in and around the Oquirrh Mountains, Utah, including Anaconda's shares of New Bingham Mary stock.

22. Following Kennecott's purchase of Anaconda's assets, Kennecott was at all times New Bingham Mary's majority and controlling shareholder and controlled all aspects of New Bingham Mary's governance, assets and affairs. From the time Kennecott purchased Anaconda's assets until the Merger, all of New Bingham Mary's officers and directors were officers, directors, or employees of Kennecott. As such, a conflict of interest existed between Kennecott and its designated officers, directors and employees whom it caused to be elected as New Bingham Mary's officers and directors (on the one hand), and New Bingham Mary and New Bingham Mary's minority shareholders (on the other hand) with respect to dealings in which the interests of Kennecott were adverse to the interests of New Bingham Mary and New Bingham Mary's minority shareholders.

23. The Lease provides in part that, subject to certain exceptions not relevant here,

"Anaconda, or its successors, shall not assign this Mining Lease or any interest therein, and shall not sublet the Property or any part thereof, or any right or privilege appurtenant thereto, or suffer any other person to occupy or use the Property or any portion thereof without the prior written consent of Lessor, provided that such consent shall not be unreasonably withheld. Any such assignment or subletting without such consent shall be void and shall, at the option of Lessor, terminate this Mining Lease."

24. The Lease does not discuss the right to strip the surface of the Claims. The terms of the Lease include the right to mine ore on the surface of the Claims (which necessarily involves the right to strip the surface to reach ore on the Claims), but do not grant a right to remove or strip overburden or waste from the Claims for the purpose of mining ore on adjacent property.

25. Anaconda's interest under the Lease was purportedly assigned to Kennecott on November 2, 1987. No written consent to the assignment was obtained prior to the assignment. Pursuant to the terms of the Lease, the assignment was void, and New Bingham Mary had the right thereafter to terminate the Lease. Kennecott thereafter recognized that the Lease provided that the urported assignment was void and that New Bingham Mary had the right thereafter to terminate the ease, but Kennecott did not in fact cause New Bingham Mary to terminate the Lease. Kennecott id not ever disclose to New Bingham Mary's minority shareholders that the assignment was void d that New Bingham Mary had the right to terminate the Lease. Rather, Kennecott subsequently used New Bingham Mary to provide New Bingham Mary's written consent to assignment of aconda's interest under the Lease to Kennecott on March 17, 1988.

26. To ensure that New Bingham Mary and its minority shareholders received fair value

for the right to strip the surface of the Claims, independent officers and directors of New Bingham Mary, acting in the best interests of New Bingham Mary and its minority shareholders, would have terminated the Lease after New Bingham Mary's written consent was not obtained prior to assignment to Kennecott of Anaconda's interest under the Lease.

27. At the time Kennecott caused New Bingham Mary to provide written consent to the assignment, Kennecott and New Bingham Mary's officers and directors knew the value of the right to strip the surface of the Claims and knew the Claims were in a critical location with respect to westward expansion of the Bingham Mine.

28. Neither Kennecott nor New Bingham Mary's officers or directors informed New Bingham Mary's minority shareholders that New Bingham Mary's prior written consent was not obtained before Anaconda's interest in the Lease was assigned to Kennecott, that assignment of the Lease was void, and New Bingham Mary had, but did not exercise, the right to terminate the Lease. Defendants did not have notice prior to this litigation that New Bingham Mary's prior written consent was not obtained before the lessee's interest in the Lease was assigned to Kennecott, the assignment was void, and New Bingham Mary had, but failed to exercise, the right to terminate the Lease.

29. Without ever describing its interpretation to the minority shareholders, Kennecott internally viewed the Lease and the assignment to include unlimited stripping rights to the Claims.

30. Kennecott began stripping waste from the surface of the Claims as part of its expansion of its Bingham Mine during 1989 and continued stripping waste from the Claims thereafter.

31. Kennecott and New Bingham Mary's officers and directors knew Kennecott had begun stripping the surface of the Claims, but did not disclose to New Bingham Mary's minority

shareholders that Kennecott was stripping waste from the surface of the Claims as part of an expansion of the Bingham Mine. At a 1992 annual meeting of New Bingham Mary's shareholders, a director of New Bingham Mary who was also an officer and employee of Kennecott concealed the fact Kennecott had begun stripping the Claims and informed minority shareholders the Claims were located "above and around" the Bingham Mine. At the time of the 1992 shareholder meeting, Kennecott had been stripping the surface of the Claims for three years, therefore the Claims were located within the Bingham Mine.

32. Kennecott conducted stripping activities on the Claims for approximately six years before mining ore from either of the Claims. Kennecott began removing ore by surface mining from one of the Claims as part of its operation of the Bingham Mine during 1995 and continued to remove ore from that Claim in 1996. Kennecott never removed ore from the other Claim. The predominant purpose of Kennecott's stripping activities on the Claims was to enable Kennecott to access ore on property adjacent to the Claims.

33. The minority shareholders, including Defendants, did not have notice that Kennecott had begun stripping the surface of the Claims and removing ore from the Claims before the Special Meeting of Shareholders of New Bingham Mary held November 12, 1997, at which shareholders were invited to vote for or against the Merger.

34. Had the Lease been terminated, New Bingham Mary would have been entitled to negotiate a new lease on the Claims as of 1987. An arm's-length negotiation would have resulted n fair and reasonable compensation to New Bingham Mary for the value of stripping rights, the value of shallower, porphyry that can be mined using open-pit methods, and the value of deeper, skarn ore

that can be mined using underground mining methods.

35. Kennecott, as the majority and controlling shareholder of New Bingham Mary, and the officers and directors of New Bingham Mary caused the affairs of New Bingham Mary to be operated in a way that was to Kennecott's benefit and to the detriment of New Bingham Mary and New Bingham Mary's minority shareholders. Kennecott and the officers and directors of New Bingham Mary:

a. Failed to inform New Bingham Mary's minority shareholders of the value of New Bingham Mary's assets, including the stripping rights held by New Bingham Mary;

b. Failed to seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to consenting to the assignment of the lessee's interest in the Lease to Kennecott;

c. Failed to terminate the Lease when New Bingham Mary's prior written consent was not obtained before the assignment of the lessee's interest in the Lease to Kennecott;

d. Failed to inform New Bingham Mary's minority shareholders that New Bingham Mary's prior written consent was not obtained before the purported assignment of the lessee's interest in the Lease to Kennecott, that the assignment of the Lease was void, and that New Bingham Mary had, but did not exercise, the right to terminate the Lease;

e. Failed to object to Kennecott stripping waste from the surface of the Claims beginning in 1989 and continuing thereafter because the assignment was void and the Lease should have been terminated;

f. Concealed from New Bingham Mary's minority shareholders that Kennecott had begun stripping waste from the surface of the Claims beginning in 1989 and continuing thereafter;

g. Failed to object to Kennecott removing ore from the Claims beginning in 1995 and continuing through 1996 because the assignment was void and the Lease should have been terminated;

h. Failed to inform New Bingham Mary's minority shareholders Kennecott had begun stripping waste from the surface of the Claims during 1989 and continued to do so, and had begun removing ore from the claims during 1995 and continued to do so through 1996;

i. Failed to seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to Kennecott's continuing and ongoing stripping of waste from the surface of, and mining ore from the surface of, the Claims;

j. Failed to seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to the valuation of New Bingham Mary's assets and Shares for purposes of the Merger; and

k. Failed to seek or obtain an impartial and independent appraisal of New Bingham Mary's assets and Shares based on independent information and all elements of value of New Bingham Mary's assets, including the deeper, skarn ore located within the Claims and the right to strip the surface of the Claims.

36. The foregoing acts and failures by Kennecott and New Bingham Mary's officers and directors constitute breaches of their respective fiduciary duties to New Bingham Mary and its minority shareholders to maximize the value of New Bingham Mary and New Bingham Mary's assets for all shareholders, and the duty to act in a fair and responsible manner with respect to New Bingham Mary and its minority shareholders. Kennecott's and New Bingham Mary's officers' and directors' breaches of their fiduciary duties were continuing and ongoing until the Merger.

37. Prior to this litigation, the minority shareholders, including Defendants, were not informed by Kennecott or New Bingham Mary's officers or directors, did not know, did not have notice of, and had not discovered the value of New Bingham Mary's assets, including the stripping rights, that New Bingham Mary had not given its prior written consent to the assignment, that the assignment was void, that New Bingham Mary had—but did not exercise—the right to terminate the Lease, that Kennecott had begun removing and continued to remove waste from the Claims, that Kennecott had begun mining and continued to mine ore from the Claims, that New Bingham Mary's officers and directors did not seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to the value of the Claims, the assignment, Kennecott's stripping and mining activities on the Claims, or the Merger.

38. Plaintiff has not shown by a preponderance of the evidence that New Bingham Mary's minority shareholders, including Defendants, in the exercise of reasonable care, should have

discovered, prior to this lawsuit, the breaches of fiduciary duties by Kennecott and New Bingham Mary's officers and directors. Plaintiff has not shown by a preponderance of the evidence that New Bingham Mary's minority shareholders, including Defendants, lacked diligence or delayed unreasonably in asserting claims for breaches of fiduciary duties, and has not shown by a preponderance of the evidence it was prejudiced by any such delay or lack of diligence. Nor has Plaintiff shown by a preponderance of the evidence that by asserting the claims for breaches of fiduciary duties, Defendants are taking a position inconsistent with any prior act, statement, or admission by Defendants or other minority shareholder of New Bingham Mary. Plaintiff has not shown by a preponderance of the evidence that New Bingham Mary's minority shareholders, including Defendants, discovered, or in the exercise of reasonable care should have discovered, prior to this lawsuit, grounds for objecting to acts and omissions by Kennecott or New Bingham Mary's officers or directors constituting breaches of their respective fiduciary duties.

39. The foregoing breaches of fiduciary duties by Kennecott and New Bingham Mary's officers and directors caused New Bingham Mary and its minority shareholders to receive less than fair value for the assets of New Bingham Mary.

40. The assets of New Bingham Mary at the time of the Merger included New Bingham Mary's claims for breaches of fiduciary duty against its officers, directors, and majority and controlling shareholder, Kennecott. The value of such claims must be included in the fair value of the Shares as of the date of the Merger, and is at least equal to the value of the assets given up by the management of New Bingham Mary to Kennecott in transactions between New Bingham Mary and Kennecott that were not at arm's length. That value is at least equal to the reasonable compensation

New Bingham Mary would have obtained for the stripping rights to the Claims and other assets in a transaction negotiated on an arm's length basis.

41. In the alternative, the value of the Shares at the time of the Merger included all the value of the Claims unencumbered by the Lease, which Lease should be disregarded as properly terminable as of 1987. That value is likewise at least equal to the reasonable compensation New Bingham Mary would have obtained for the stripping rights to the Claims and other assets in a transaction negotiated on an arm's length basis.

42. The appraisal of New Bingham Mary by Gerald P. Halmbacher presented by Plaintiff at trial was not independent and was based on information provided by Kennecott that could only lead to a determination that was unfairly favorable to Kennecott and the Plaintiff and unfavorable to the minority shareholders. Plaintiff's appraisal does not reflect the fair value of New Bingham Mary's assets or the Shares.

43. The expertise and qualifications of Defendants' expert witnesses, Bernard J. Guarnera and Donald P. Bellum, in evaluating the technical and appraisal matters about which each testified is unquestionable by reason of their respective skills, backgrounds, education, and experience in the mining industry, appraising mining properties, managing and operating mining companies and mining operations, and negotiating acquisitions and sales of mining properties. The Court finds their testimony and expert opinions were based on thorough analysis of all of the factors relevant to the analyses they performed and correctly applied those factors to the income and market approaches they used to value the assets of New Bingham Mary. The Court finds the testimony of Mr. Guarnera and Mr. Bellum was reliable, helpful, and persuasive in determining the fair value of the Claims and

the Shares.

44. The Court adopts the appraisals and methodology of Mr. Guarnera and Mr. Bellum with respect to the fair value of the Claims and the Shares as follows:

a. The Court adopts the Defendants' experts' opinions concerning the technical and economic factors relevant to determining the fair value of New Bingham Mary's assets as of December 31, 1997, including commodity prices, discount rates, and tax basis. The Court finds those opinions are based on reliable data correctly applied to appropriate valuation and appraisal methods.

b. The Court adopts the Defendants' experts' opinion that a five percent net smelter returns royalty rate reflects the fair royalty rate reflective of the market at all relevant times that results in fair value being given for the ore located within the Claims. From 1987 and thereafter, parties negotiating at arm's length, acting in their own respective best interests, would negotiate a five percent net smelter return royalty rate for the ore located within the Claims.

c. Based on a five percent net smelter return royalty rate, the net present value of the shallower, porphyry ore located within the Claims is $2,385,745 ($1,368,605 net present value of royalties at 3% royalty rate contained in the report of Defendants' experts times 5/3 = $2,281,008 plus $104,737 net present terminal value of Lease = $2,385,745) as of December 31, 1997.

d. The Court adopts the Defendants' experts' opinion that the fair value of the Shares of New Bingham Mary includes additional value for the deeper, skarn ore located within the Claims. The Court finds that known skarn mineralization lies within the Claims and that a prudent person would ascribe a value of $13.3 million to the known skarn mineralization located within the Claims. Based on the royalty rate of five percent, $665,000 of that amount ($13.3 million times 0.05 = $665,000) is ascribed to the value of New Bingham Mary as of December 31, 1997.

e. One method of determining the fair value of the right to strip the surface of the Claims is to determine what portion of the net cash flow (derived from the value of ore made available by having the right to strip the surface of the Claims) a prudent buyer acting in its own best interests would pay and a prudent seller acting in its own best interests would accept in exchange for the stripping rights.

f. The right to strip the surface of the Claims controlled access to ore reasonably projected by the income method of valuation to generate more than $3 billion in gross revenues and more than $762 million in net cash flows with a net present value of more than $238 million as of December 31, 1997.

g. The Court finds a prudent buyer acting in its own best interests would pay, and a prudent seller acting in its own best interests would accept, fifteen percent of the net present value of $238 million, or $35,700,000.

h. Alternatively, the fair value of the right to strip the surface of the Claims may be determined by the royalty rate a prudent buyer would pay and a prudent seller would accept on ore made available by having the right to strip the surface of the Claims. The Court finds a prudent buyer would pay, and a prudent seller would accept, a net smelter returns royalty of two percent on the ore made available by having the right to strip the surface of the Claims. A two percent net smelter return royalty on all ore made available by obtaining the right to strip the surface of the Claims would generate income for New Bingham Mary with a net present value of $30,534,341 as of December 31, 1997. Forty percent of the net present value of royalties derived from ore located within the Claims (2%/5%) is subtracted from this number to avoid double counting royalties derived from ore located within the Claims. Thus, the net present value of the stripping rights based on royalties is $29,580,043 ($30,534,341 minus forty percent of $2,385,745 = $29,580,043) as of December 31, 1997.

i. The Court finds both methods of valuing the stripping rights valid and relevant, and adopts the average of the two methods, $32,640,000 or $33.61 per Share of New Bingham Mary, as the fair value of the stripping rights as of December 31, 1997. The value of the stripping rights is in addition to and independent of the value of the ore located within the Claims.

j. The Court finds New Bingham Mary held $348,900 in cash assets as of December 31, 1997, all of which is included in the value of New Bingham Mary.

45. In summary, the Court finds the value of New Bingham Mary as of December 31, 1997, is as follows:

	Net Value	Value per Share[1]
Cash	$348,900	$0.36
Value of deep skarn mineralization located within the Claims	$665,000	$0.68
Value of shallow porphyry mineralization located within the Claims	$2,385,745	$2.46
Value of stripping rights	$32,640,000	$33.61
Total fair value of Shares	$36,039,645	$37.11

46. The fair value of the Shares, and the amount that must be paid pursuant to the Merger, is $37.11 per Share. The Defendants were already paid on the basis of $1.10 per Share. The Additional amount per Share that must be paid to Defendants pursuant to the Merger is $36.01 per Share, the difference between the fair value of the Shares and the amount already paid for the shares ($37.11 per Share – $1.10 per Share = $36.01 per Share).

47. Defendants are entitled to a total award (representing the fair value of all of the Shares as of December 31, 1997) in the amount of $1,325,204.00 ($36.01 per Share times 36,801 Shares = $1,325,204.00). The calculation of prejudgement interest at the legal rate of ten percent per year from February 18, 1998, the date that Defendants were paid on the basis of $1.10 per Share, to January 13, 2004, equals $781,870.36 ($1,325,204.00 times 0.10/year times 5.90 years = $781,870.36). The total amount to which the Defendants are entitled through January 13, 2004,

[1]Value per Share = Net Value divided by 971,200 New Bingham Mary Shares issued and outstanding as of December 31, 2997.

equals $2,107,074.36 and is summarized as follows:

	Shares	Judgment	Prejudgment Interest	Total
Marilyn Groesbeck Glade	14,720	$530,067.20	$312,739.64	$842,806.84
Robert Groesbeck	14,721	$530,103.21	$312,760.89	$842,864.10
Robert R. Groesbeck Living Trust	7,360	$265,033.60	$156,369.82	$421,403.42

48. The Court finds in all respects as set forth and implied by the following Conclusions of Law.

CONCLUSIONS OF LAW

49. The court concludes in all respects as set forth and implied by the foregoing Findings of Fact.

50. Defendants dissented from the Merger and Defendants properly perfected their dissenter's rights. Defendants complied with the requirements of Utah Code Ann. § 16-10a-1330 et seq. and are entitled to an award equal to the fair value of their Shares.

51. Extrinsic evidence concerning the intent of the parties to the Lease is admissible to allow the Court to determine whether the Lease is ambiguous and, if so, to interpret the Lease. Plaintiff's Objections to Defendants' Trial Exhibits 108, 125, and 128 are therefore overruled, and each of those Exhibits are admitted into evidence. In addition, Plaintiff's Motion in Limine to Exclude the Introduction of Evidence to Interpret the 1979 Lease is denied.

52. Breaches of fiduciary duty that affect the fair value of New Bingham Mary's assets are relevant to determination of the fair value of the Shares to the extent the statute of limitations on

those breaches has not run. Plaintiff's Motion in Limine to Exclude Evidence of Breach of Fiduciary Duty Unrelated to the Merger is therefore denied, and such evidence is admitted into evidence.

53. The value of the right to strip the surface of the Claims is relevant to determining the fair value of New Bingham Mary's assets and the Shares. Plaintiff's objection to admission of evidence concerning the fair value of the right to strip the surface of the Claims is therefore denied.

54. New Bingham Mary's majority shareholder, officers, and directors owed New Bingham Mary and New Bingham Mary's minority shareholders, including Defendants, fiduciary duties to maximize the value of New Bingham Mary for all shareholders, and the duty to act in a fair and responsible manner with respect to New Bingham Mary and its minority shareholders.

55. A conflict of interest existed between New Bingham Mary's majority and controlling shareholder and the controlling shareholder's designated officers and employees whom it caused to be elected as New Bingham Mary's officers and directors (on the one hand), and New Bingham Mary and New Bingham Mary's minority shareholders (on the other hand) with respect to dealings in which the interests of Kennecott were adverse to the interests of New Bingham Mary and New Bingham Mary's minority shareholders. Those transactions include consenting to the assignment of Anaconda's interest in the Lease to Kennecott, Kennecott's stripping waste from the surface of the Claims, Kennecott's mining ore from the Claims, determination of the consideration to be paid to New Bingham Mary's minority shareholders pursuant to the Merger, and keeping New Bingham Mary's minority shareholders informed of New Bingham Mary's dealings with Kennecott. The actions and omissions of New Bingham Mary's officers and directors with respect to New Bingham Mary's dealings with Kennecott are not protected by the business judgment rule but instead are

judged by the Court on the basis of their fairness to New Bingham Mary and the minority shareholders.

56. New Bingham Mary's majority shareholder, officers, and directors breached their fiduciary duties to New Bingham Mary and New Bingham Mary's minority shareholders, including Defendants, by:

a. Failing to inform New Bingham Mary's minority shareholders of the value of New Bingham Mary's assets, including the stripping rights held by New Bingham Mary;

b. Failing to seek or obtain the impartial judgment of an independent and disinterested third party, independent and disinterested directors, or independent and disinterested legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to consenting to the assignment of the lessee's interest in the Lease to Kennecott;

c. Failing to terminate the Lease when New Bingham Mary's prior written consent was not obtained before the assignment of the lessee's interest in the Lease to Kennecott;

d. Failing to inform New Bingham Mary's minority shareholders that New Bingham Mary's prior written consent was not obtained before the purported assignment of the lessee's interest in the Lease to Kennecott, that the assignment was void, and that New Bingham Mary had, but failed to exercise, the right to terminate the Lease;

e. Failing to object to Kennecott stripping waste from the surface of the Claims beginning in 1989 and continuing thereafter because the assignment was void and the Lease should have been terminated;

f. Concealing from New Bingham Mary's minority shareholders that Kennecott had begun stripping waste from the surface of the Claims beginning in 1989 and continuing thereafter;

g. Failing to object to Kennecott removing ore from the Claims beginning in 1995 and continuing through 1996 because the assignment was void and the Lease should have been terminated;

h. Failing to inform New Bingham Mary's minority shareholders Kennecott had begun stripping waste from the surface of the Claims during 1989 and continued to do so, and had begun removing ore from the claims during 1995 and continued to do so through 1996;

i. Failing to seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to Kennecott's continuing and ongoing stripping of waste from the surface of, and mining ore from the surface of, the Claims;

j. Failing to seek or obtain the impartial judgment of an independent and disinterested third party, independent directors, or independent legal counsel to protect the rights of New Bingham Mary and its minority shareholders with respect to the valuation of New Bingham Mary's assets and Shares for purposes of the Merger; and

k. Failing to seek or obtain an impartial and independent appraisal of New Bingham Mary's assets and Shares based on independent information and all elements of value of New Bingham Mary's assets.

57. Because New Bingham Mary did not give its prior written consent to assignment of Anaconda's interest in the Lease to Kennecott, the assignment was void and the Lease could be terminated at New Bingham Mary's option. Determination of the fair value of Defendants' Shares of New Bingham Mary is therefore not limited to income that would be generated pursuant to the royalty rate and other provisions under the Lease.

58. The Statute of Limitations under Utah Code Ann. § 78-12-27 does not begin to run until the minority shareholders or an independent officer or director discovers, or in the exercise of reasonable care should have discovered, that there was a wrong to be complained of. Plaintiff has not shown by a preponderance of the evidence that, prior to this litigation, any independent officer or director of New Bingham Mary, or any minority shareholder of New Bingham Mary, including Defendants, discovered, or in the exercise of reasonable care should have discovered, the breaches of fiduciary duties by Kennecott and New Bingham Mary's officers and directors. Plaintiff's affirmative defense with respect to the of statute of limitations is denied.

59. Plaintiff has not shown by a preponderance of the evidence that New Bingham Mary's minority shareholders, including Defendants, lacked diligence or delayed unreasonably in asserting claims for breaches of fiduciary duties, and has not shown by a preponderance of the evidence it was prejudiced by any such lack of diligence or delay. Nor has Plaintiff shown by a preponderance of the evidence that by asserting the claims for breaches of fiduciary duties, Defendants are taking a position inconsistent with any prior act, statement, or admission by Defendants or other minority shareholder of New Bingham Mary. Plaintiff has not shown by a preponderance of the evidence that New

Bingham Mary's minority shareholders, including Defendants, discovered, or in the exercise of reasonable care should have discovered, prior to this lawsuit, grounds for objecting to acts and omissions by Kennecott or New Bingham Mary's officers or directors constituting breaches of their respective fiduciary duties. Plaintiff's affirmative defense with respect to laches and estoppel are denied.

60. Defendants are entitled to judgment in the amount of $1,325,204.00 ($36.01 per Share times 36,801 Shares = $1,325,204.00). In addition, Defendants are entitled to prejudgment interest at the legal rate of ten percent per year from February 18, 1998, the date that Defendants were paid on the basis of $1.10 per Share. Interest from February 18, 1998, to January 13, 2004, equals $781,870.36 ($1,325,204.00 times 0.10/year times 5.90 years = $781,870.36). Defendants are therefore entitled to judgment in the amount of $2,107,074.36 as follows:

	Shares	Judgment	Prejudgment Interest	Total
Marilyn Groesbeck Glade	14,720	$530,067.20	$312,739.64	$842,806.84
Robert Groesbeck	14,721	$530,103.21	$312,760.89	$842,864.10
Robert R. Groesbeck Living Trust	7,360	$265,033.60	$156,369.82	$421,403.42

61. In addition, Defendants are entitled to interest at the rate of $3,630.70 per day from January 14, 2004, until the date the Judgment is signed as follows: Marilyn Groesbeck Glade, $1,452.24 per day; Robert Groesbeck, $1,452.34 per day; and Robert R. Groesbeck Living Trust, $726.12 per day. In addition, Each Defendant is entitled to interest at the judgment rate of 3.41 percent per year or as that rate may change from time to time from the date the Judgment is signed.

DATED this 15 day of January, 2004.

BY THE COURT

Stephen L. Henriod
District Court Judge

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January 2004, I caused a true and correct copy of the foregoing *[Proposed] Findings of Fact and Conclusions of Law* to be served via hand delivery, on the following:

John B. Wilson
Margaret Niver McGann
PARSONS BEHLE & LATIMER
201 South Main, Suite 1800
Salt Lake City, UT 84145-0898

Wendy L. Manning

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